Submitted Dec 21 1874

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 761.

R. C. GARDNER, APPELLANT,

vs.

JOHN C. BROWN, ADMINISTRATOR OF RICHARD W. VASSER, DECEASED.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE

FILED DECEMBER 9, 1874.

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1 UNITED STATES OF AMERICA,
Middle District of Tennessee, ss:

At a circuit court of the United States begun and held at the Federal court-room in the capitol of said State, in Nashville, within and for the district aforesaid, on the third Monday, being the 20th day of October, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the 98th year.

Present, the Hon. Connally F. Trigg, United States district judge for the several districts of Tennessee.

Present also, Edward R. Campbell, esq., clerk of said court, and William Spence, esq., marshal of said district.

The following proceedings were had, to wit:

On the 21st day of November, 1872, a transcript of the record and proceedings had in the chancery court of the State of Tennessee, at Pulaski, Giles County, Tennessee, in the cause of John C. Brown, administrator of Richard W. Vasser, decd., against Richard C. Gardner and John C. Walker, was filed; which is as follows:

2 STATE OF TENNESSEE,
Giles County:

Be it remembered that, on this the 1st Monday in September, 1872, being the 2d day of said month, and being the time appointed by law for holding the chancery court of Giles County, at the court-house in Pulaski—present, J. B. Stacy, clerk and master, and David H. Parsons, sheriff of Giles County—and the following proceedings were had and entered:

Court was opened according to law, and the Hon'l William S. Flemming, chancellor, having failed to appear, court was adjourned until to-morrow morning at 9 o'clock.

J. B. STACEY, *C. & M.*

TUESDAY, *Sept.* 3, 1872.

Court met pursuant to adjournment, the Hon'l. William S. Flemming, chancellor, &c., having appeared and taken the bench, the following, among other proceedings, were had and entered of record, to wit:

Original bill.—Filed 29 *Jan'y*, 1869.

JOHN C. BROWN, ADMR. OF THE ESTATE OF Richard W. Vasser, dec'd,
vs.
RICHARD C. GARDNER AND JOHN C. WALKER. } Original bill.

To the Hon. John C. Walker, chancellor, &c., of the fourth division of the State of Tennessee, sitting at Pulaski, in and for Giles County:

JOHN C. BROWN, ADMR. OF THE ESTATE OF Richard Vasser, dec'd, complts.,
vs.
RICHARD C. GARDNER, OF THE CITY AND STATE of New York, and John C. Walker of Giles County, defts.

3 Comp'ainant represents and shows unto your honor that Richard W. Vasser died intestate in the year 1864, having his home

and residence in the State of Alabama, but having an estate and choses in action in Giles County, Tennessee. And pursuant to the laws of the State of Tennessee in such cases, letters of administration were issued by the county court of Giles County to complainant John C. Brown, the necessary bond, with security, having been executed and the prescribed oath having been taken. He further represents that among other choses in action and assets belonging to the intestate at the time of his death, there were several notes executed to him during his lifetime by the defendant Richard C. Gardner, and dated the 3rd day of November, 1862, all payable to the said Richard W. Vasser, and five of them for four thousand dollars each, and due and payable respectively the 1st January, 1863; 1st Jan'y, 1864; 1st Jan'y, 1865; 1st Jan'ry, 1866; and the other one for forty thousand dollars, due and payable the 1st day of January, 1867. All of said notes were made and executed in the State of Alabama, as complainant is informed and believes, and the contract upon which they were based was also made in said State, as he is informed and believes, and according to the laws of that State they bear interest at the rate of eight per cent. per annum after their maturity, until paid. Complainant further charges that, for the purpose of securing the payment of said notes, the said Richard C. Gardner, on the 4th day of November, 1862, made and executed a deed of trust or mortgage to the defendant, Jno. C. Walker, conveying to him certain lands in Giles County, Tennessee, lying on Elk River, and in the 1st civil district, to wit:

One tract, containing 176½ acres, and bounded as follows, to wit: Beginning at a stone in the north boundary-line of a tract in the
4 name of R. W. Vasser, and the S. E. corner of a tract formerly belonging to the heirs of Reuben Freeman, deceased; running thence north with Freeman's line 140½ poles to a stake, Richard S. Holloway's southwest corner; thence *thence* with his line south 88½° 137½ poles, to a beech; thence with the same 38¾ poles to a stake with pointers, with Hunnicutt's corner; thence east with his line 53 poles to a pointer; thence with the same 174½ poles to a stake in a lane and road; thence with the line of the tract in the name of Vasser, west 191 poles, to the beginning.

One other tract, containing 453 acres and 60 poles, and being the same purchased by R. W. Vasser under a decree of the chancery court at Pulaski, in the cause of Judith C. Freeman, and others vs. Louisa M. Freeman and others, the specific boundaries of which are not given in said conveyance, but reference is had for them to the records and papers on file in said cause, but the boundaries are set forth in Exhibit O, herewith filed as a part of this bill.

Another tract of 674 acres, lying contiguous, the boundaries of which fully appear from Exhibit P, herewith filed, as a part of this bill.

One other tract, containing 117 acres and 118 poles, formerly belonging to Joel Freeman, dec'd, and bounded as follows, to wit: Beginning at an elm on the bank of a branch near the mouth of the Elk River, south 48° west 72 poles, to a stake in the Huntsville road; thence along said road 39 poles to a stake; thence east an old marked line 202 poles to a stake with dogwood pointers; then north 82 poles to a stake; thence north 64° west 24 poles to a stake, with beach pointers; thence north 41° west 38 poles, to a stake with beach pointers; thence north
5 poles to a maple; thence south 69° west 96 poles, to the begin-
5 ning, being the same land before that time sold and conveyed by the said Vasser to the said Gardner. The other property con-

veyed in said deed was lost to the trust in the possession of said Gardner.

The deed of trust or mortgage provides upon its face that, if all the notes should be paid as they fell due, that the conveyance should be void, but if not, then said Walker, as trustee, might take possession of said property, and, after giving 20 days' notice in writing at three public places in Giles County, Tennessee, might expose said property, or a sufficiency thereof, to pay said notes as they fell due, to public sale, and sell the same to the highest bidder for cash, and appropriate the proceeds, first, to the necessary expenses of the execution of the trust, and secondly, to the satisfaction of said notes, and any interest that may accrue on the same. And the conveyance contains the further provision, to wit: "If the land, or any part of the same, be sold under this deed, then the same will be sold free from the equity of redemption, and I hereby, in the event the same shall be sold under this deed, relinquish all my right to redeem said land."

He charges the said deed was duly recorded in November, 1862, in book BB, pages 482, 483, of the register's office of Giles County, and a copy therof is herewith filed as a part of this bill, marked Exhibit "R. C. G.," as an exhibit hereto.

Complainant further represents and charges that the aforesaid notes, as he is informed and believes, were placed in the hands of the said Walker for safekeeping, and for collection as they fell due, and that a short time before the war closed they were distroyed in the safe of the said Walker, in the town of Pulaski; that no part of them had been
6 paid; that they had been paid, transferred, or assigned, or *or* exchanged by the said R. W. Vasser, or by the said John C. Walker, and that they belonged then, and until his death, to the said R. W. Vassar, and the right to collect the same passed to complainant upon his qualifications as aforesaid; and although the complainant has had diligent search made for said notes, and has caused the said Walker to make diligent search therefor, the same cannot be found, and the said Walker has informed complainant that they were destroyed, and the said Walker has made affidavit to that fact, which will be filed in the cause if required.

Complainant charges that Exhibits A, B, C, D, E, & F, hereto filed, are substancially copies of said notes, as he is informed and believes, and he asks that they be taken as substancial copies, and set up in lieu of the original. All of said notes are now due and unpaid, and entitled to no credit so far as he knows and beleives, except as shown in statement H, hereto annexed, which complainant are all the credits to which said notes are entitled.

The said R. C. Gardner is a non-resident.

Now complainant charges that the said Walker has never given bond as trustee of said trust, and has taken no steps to foreclose the trust, and does not wish or intend to execute the same; and complainant charges that he has the right to come into this court and have the trust closed by a sale of the lands aforesaid for cash, and free from the equity of redemption, and have the proceeds applied, after the payment of all costs incident to the foreclosure, to the satisfaction of the balance due on said debts.

The premises considered, he prays that the said R. C. Gardner and Jno. C. Walker be made parties by publication and process to answer; that they answer this bill, and that on a final hearing that your
7 honor order said mortgage to be foreclosed by a sale of said land for cash, and free from the equity of redemption, and the money

arising therefrom applied to the satisfaction of the residue of complainants' debt; and for all other relief meet and proper in the premises.

JNO. C. BROWN,
Adm'r and Sol'r.

STATE OF TENNESSEE,
Giles County:

Personally appeared before me, A. Cox, clerk & master of the chancery court at Pulaski, Jno. C. Brown, adm'r, &c., the foregoing complainant, and made oath that the allegations of his foregoing bill, as he is informed and believes, are true, and the allegations made upon his own knowledge are true; and he further makes oath that deft., R. C. Gardner, is a non-resident of the State of Tennessee.

JNO. C. BROWN, *Adm'r.*

Sworn to and subscribed before me Jan'y 29, 1869.

A. COX, *C. & M.*

Exhibits A, B, C, D, E, & F are not on file, nor statement H, referred to as exhibits in the bill.

J. B. STACEY, *C. & M.*

EXHIBIT R. C. G.

R. C. Gardner to J. C. Walker.—Deed of trust.

Know all men by these presents that I, Richard C. Gardner, of Giles County, Tennessee, for the consideration of ten dollars to me paid, and the other considerations hereinafter mentioned, have bargained and sold, and by these presents doth bargain and sell, transfer, and convey to John C. Walker, of Giles County, Tennessee, the following described tracts of lands and slaves, said land lying and being in the county of Giles, Tennessee, on the waters of Elk River, one tract containing 698 acres and 90 poles, being
8 the same sold and conveyed to me by Richard W. Vasser, and the boundaries of which can be seen by the deed to said Vasser on the 1st of July, 1850. One tract containing 176¼ acres, and bounded as follows, to wit: Beginning at a stone on the north boundary-line of a tract in the name of R. W. Vasser, and the southeast corner of a tract formerly belonging to the heirs of Reuben Freeman, dec'd; running thence north with Freeman's line 140½ poles to a stake, Richard L. Halloway's southwest corner; thence with his line south 88° east 137½ poles, to a beech; thence north with the same 38¾ poles to a stake, with pointers with Hunnicutt's corner; thence east with his line 53 poles to a stake with pointers; thence south with the same 174½ poles to a stake in a lane and road; thence with the line of the tract in the name of said Vassar, west 191 poles to the beginning. One other tract containing 453 acres and 60 poles, and being the same purchased by R. W. Vasser under a decree of the chancery court at Pulaski, in the case of Judith C. Freeman and others against Louisa M. Freeman and others, the specific boundaries of which are contained in the papers and records on file in said cause. And also another tract containing 117 acres & 118 poles, formerly belonging to Joel Freeman, dec'd, and bounded as follows, to wit: Beginning at an elm on the bank of Spring Branch, near its mouth on Elk River, south 48 degrees west 72 poles to a stake in the Huntsville road; thence south along said road 39 poles to a stake; thence east an old marked line 202 poles to a stake with dogwood

pointers; thence north 82 poles to a stake; thence north 64°
9 west 58 poles to a stake with beech pointers; thence north 41° west 38 poles to a stake with beech pointers; thence north 5 poles to a maple; thence south 69° west 96 poles to the beginning; all of the above described lands being the same sold and conveyed to me by Richard W. Vasser, of the county of Limestone, Alabama. And I also convey to the said Walker the following slaves, to wit: Melton, Isaac, Big Daniel, Tom, Ben, Martin, Newtone, Little Daniel, Hewitt, Wyatt, Charles, Big Jim, Alexander, Little Jim, William, Joshua, Jane, Louisa, Caty, Polly, Beckey, Long Jane, Sarah Ann, Jane Skimer, Richard, Gracy, Long Nancy, Bunch Nancy, Judy, Nelly, Charlotte, Margarette, Ellen Dickey, Angeline, Ella, Ann, Weeny, Patience, Lucy, Francis, Mary, Infant Jim, Coleman, Edith, Susan, Elijah Washington, Tishing, Milly, Ida, Mat, Martha, Stephen, Bob, Henry, Joseph, Harry, Rose, George, Anthony, Marshall, Nelly, Julia, Amy, Malvine, Mourning, Dora, Edward, Milton, Edmund, Reuben, Milton, Emily, Patrick, Maria, Calvin, Lucinda, Alice, Lindsley, Amanda, Willis, Frangeline and Julius, two infant children, one of Angeline and the other of Charlotte, names unknown.

But this deed is made for the following uses and trusts, and for no other purpose, that is to say: I am indebted to the said Richard W. Vassar as follows, to wit, four thousand dollars payable on the 1st day of January, 1863; four thousand dollars, payable on the 1 day of Jan., 1864; four thousand dollars, payable on the first day of Jan., 1865; four thousand dollars, payable on the first day of Jan., 1866; four thousand dollars, payable on the 1st day of Jan., 1867; and forty thousand dollars, payable on the 1st day of January, 1867; all by notes under seal, and dated the 3rd day of November, 1862.
10 And I am anxious and desirous to secure and make certain the payment of said notes, together with any interest that may accrue on the same. Now, if I shall well and truly pay and satisfy all of said notes as they fall due, then this deed to be void. But if I fail to do so, then the said Walker, as trustee, may take possession of said property; and, after giving twenty days' notice in writing, at three public places in Giles County, Tennessee, may expose said land and said slaves, or a sufficiency thereof to pay said notes as they fall due, to public sale, and sell the same to the highest bidder for cash, and appropriate the proceeds, first, to the necessary expenses of executing this deed; secondly, to the satisfaction of said notes and any interest that may accrue on the same, and pay the balance, it any, to me. It is understood that in the meantime I am to keep possession of said land and slaves. It is also understood that the execution of this deed is not to prevent the said Vasser from collecting said notes in any other way. Said trustee will not take possession of any of said property after said notes become due, unless notified in writing to do by said Vasser. If the lands, or any part of the same, should be sold under this deed, then the same will be sold free from the equity of redemption. And I hereby, in the event the same shall be sold under the deed, relinquish all my right to redeem said land. This 4 Nov., 1862.

R. C. GARDNER. [SEAL.]

STATE OF TENNESSEE,
Giles County:

11 Personally appeared before me, Amos R. Richardson, clerk of the county court of Giles County, Tennessee, Richard C. Gardner, the maker of the within instrument, with whom I am personally

acquainted, and who acknowledged the same to be his act and deed for the purposes therein contained.

Witness my hand, at office, Nov. 11, 1862.

AMOS R. RICHARDSON, *Clerk.*

STATE OF TENNESSEE,
Giles County:

REGISTER'S OFFICE.

This is a true copy from the record of a deed of trust from R. C. Gardner, to J. C. Walker, recorded in book BB, pages 482 & 483, this January 20, 1869.

J. P. ANDERSON,
Deputy Register.

EXHIBIT P.

And the other tract, containing 674 acres, and bounded as follows, to wit: Beginning at a stake in the Huntsville road, between Freeman's corner, and running 106 poles to a sweet-gum, white-oak, and beech, beech marked J. Haywood; thence west 37 poles to an elm, in Reuben Freeman's grave-yard; thence south 193½ poles to a white-oak on the bank of Elk River, Reuben Freeman's corner; thence with the meanderings of said river to an oak at the mouth of Rock Spring Branch, Wm. Menifee's corner, east 40 poles to a hic'ory in the Hurricane, Wm. Menifee's corner; thence north 150 poles to a buckeye, Wm. Menifee's corner; thence east 326 poles to a beech, Henry Dumnevant's corner; thence north 195 poles to a birch, corner Sarah Lewter's and Wm. Hunnicutt's; thence west 436 poles, more or less, to the beginning, containing 674 acres, more or less.

12 EXHIBIT O.

Beginning at a stake in the Huntsville road, on the south bank of said river; thence south, with middle of said road, 42 poles, to a stake, Vance's corner; thence east, with Vance's line, 200 poles and 17 links, to a stake with dogwood pointers; thence south, with Vasser's line, 97 poles, to a stake in Vasser's N. B.; thence west, with same, 200 poles and 19 links, to a stake in Huntsville road; thence south 104 poles, a white-oak; thence west 37 poles, to an elm; thence south 194 poles, to a stake, with white-oak and beech pointers, on the bank of said river; thence, up said river, with the water's edge, south 80° west 52 poles; thence, with the same, north 80° west 29 poles; thence, with the same, north 45° west 34 poles; thence, with the same, north 20° west 24 poles; thence, with the same, north 11° west 15 poles, to an elm, corner of mill tract; thence, with mill tract, north 26° east 21½ poles, to a rock; thence north 67° west 13 poles, to a stake on bank of said river; thence, with the same, with water's edge, north 12° west 36 poles; thence, with the same north 30° west 56 poles; the nce, with the same, north 12° west 58 poles; thence, with the same, north 15° east 28 poles; thence, with the same, north 28° east 54 poles; thence, with the same, north 43° east 46 poles; thence, with the same, north 52°, to the beginning, and contains 453 $\frac{60}{100}$ acres.

Bond.—Filed 29 January, 1869.

JOHN C. BROWN, ADM'R,
vs.
R. C. GARDNER ET ALS.

Know all men by these presents that we, John C. Brown, adm'r, as principal, and W. H. McCallum as security, all of the county of Giles and State of Tennessee, are held and firmly bound unto Richard C. Gardner and John C. Walker in the sum of two hundred and fifty dollars, for which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Witness our hands and seals this 29 day of January, 1869.

13

The condition of the above obligation is such that whereas the above bound John C. Brown, adm'r, &c., has this day filed in the chancery court at Pulaski a bill against the said R. C. Gardner and John C. Walker.

Now, if the said John C. Brown shall prosecute his said bill with effect, or pay all costs incident to a failure thereof, then this obligation to be void; otherwise to remain in full force and virtue.

W. H. McCALLUM. [SEAL.]

Subpœna to answer, 24th February, 1869.

JOHN C. BROWN, ADM'R,
v.
R. C. GARDNER ET AL.

State of Tennessee to the sheriff of Giles County, greeting:

You are hereby commanded to summon John C. Walker to appear before the chancellor of the fourth division of the State of Tennessee at the next chancery court, to be holden for the county of Giles, at the court-house in the town of Pulaski, in the said county of Giles, on the first Monday in *Monday* next, to answer a bill in equity exhibited against him and R. C. Gardner, in our said court, by John C. Brown, adm'r of R. W. Vasser; and this you shall in no wise omit, under the

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penalty prescribed by law; and have you then and there this writ.

Witness, A. Cox, clerk & master of said court, at office in Pulaski, the 1st Monday in Sept., 1868, and year of American Independence.

A. COX, *C. & M.*

(Endorsed:) I acknowledge service of the within s'p'a.
Feb'y 24, 1869.

J. C. WALKER.

Answer of R. C. Gardner.—Filed July 10, 1871.

The separate answer of Richard C. Gardner to the bill filed by John C. Brown, administrator of Richard W. Vasser, decd., against the said Gardner et al., in the chancery court at Pulaski, Tennessee.

Respondent, saving and reserving the benefit of all just exception to said bill, to much thereof as he is advised it is material for him to answer, answering, says: He admits that Richard W. Vasser died intestate in 1864, having his home and residence in the State of Alabama, and it is probably true that he had an estate and choses in action in Giles County, Tennessee. He admits that pursuant to the law of Tennessee in such

cases, complainant was duly appointed and qualified, and entered upon the discharge of his duties as administrator of the said Vasser. It may be true that among the choses in action and other assets belonging to the intestate at the time of his death there were several notes executed to the intestate at the time of his death (?) by respondent, dated the 3rd day of November, 1862, all payable to the said Richard W. Vasser,
15 and five of them for four thousand dollars each, and due and payable respectively on the 1st day of Jan'y, 1863, 1st Jan'y, 1864, 1st Jan'y, 1865, 1st Jan., 1866, and the 1st Jan'y 1867, and the other for forty thousand dollars, payable on the 1st Jan'y, 1867.

Respondent admits that all of said notes were made and executed in the State of Alabama, and the contract upon which they were based was made also in the State of Alabama, and was entered into at Athens, in said State, on the 7th day of May, 1862. Respondent files herewith a true copy of said contract, marked "Exhibit A," and prayed to be taken as a part hereof, but he will produce and file the original when required. Upon an examination of said contract (it will be seen, as the fact was) made between the said Vasser who was then and had been for many years previous thereto, a citizen and resident of the county of Limestone and State of Alabama, and respondent, who was then, and had been for many years previous thereto, a resident and citizen of the city of Nashville, in the county of Davidson and State of Tennessee. During the late rebellion waged by the organization of insurgents known as the so-called Confederate States against the Government of the United States, the United States troops captured the city of Nashville from said insurgents and permenently held and occupied the same from the 22 Feb'y, 1862, until the close of the rebellion. On the other hand, said insurgent confederates held within their military control and occupied Athens in the State of Alabama up to May 4, 1862, when they were temporarily dislodged by the United States forces who held possession from
16 May 4, 1862, to August 29, 1862, when said confederates regained military possession of the place, and continued in occupation of it until July 19, 1863. It will thus be seen that it was on the third day after the temporary capture aforesaid of Athens, Alabama, by the United States troops, the contract aforesaid was made in said Athens, Ala., and respondent is advised and insi'ts that it was a violation of the non-intercourse acts of Congress passed July 13, 1861, section 5, and July 31, 1861, section 1, and of the President's proclamation in pursuance thereof, and of the general laws of the land, for respondent and said Vasser, with their respective political status as above set forth, to attempt to make such a contract; that the same was and is illegal and void, and that the notes and mortgage based thereon are also void, and he relies upon this defence as fully as though specially pleaded. It will be further seen from said contract that the said Vasser attempted to sell to this respondent his (Vasser's) tract of land near Elkton, Tennessee, containing about 1,445 acres; also all the negroes on said plantation, about ninety in number, and all of the stock, corn, fodder, farming-utensils, together with all and every kind of property on or belonging to said plantation. Respondent will show that for the land, slaves, and other property above mentioned he agreed to pay forty thousand dollars, on the 1st day of January, 1867, thereafter, and in the said trade the negro slaves were estimated at twenty thousand dollars, and the land and other property together were estimated at only twenty thousand dol-
17 lars. Respondent insists that at the date of said contract the war had commenced, upon the result of which the existence of the institution of slavery depended; that the value of slaves as a property

thus exposed to peril *and* practically and really nothing, and by their actual emancipation, which speedily followed, they were in fact rendered utterly worthless, and so he insists that to the extent of twenty thousand dollars, representing the price agreed on for the slaves, the said contract and the said mortgage, and notes based thereon, were without any consideration, or, at all events, that the estate of said Vasser should be held accountable for the assumed value of said slaves, on the ground that the warranty of title of said slaves by said Vasser was broken by the emancipation of said slaves.

Respondent further shows that, under the said contract between him and said Vasser, respondent was to pay forty thousand dollars, on the 1st day of January, 1867, with interest from the date of the contract, but the said Vasser demanded, and respondent agreed to pay, interest at the rate of ten per cent. per annum on said forty thousand dollars from the date of said contract until the 1st January, 1867, and as under the laws of Alabama the legal rate of interest was only eight per cent., it was corruptly and illegally agreed that, in order to evade the said interest law of Alabama, said contract, instead of stating the contract truly as it was really made, should represent that the consideration was said five notes of $4,000.00 each and said note of $40,000.00, making an apparent
18 consideration of $60,000.00 in all, whereas, as above shown, the true consideration was $40,000, payable January 1, 1867, with interest, and said five notes of $4,000 each were mere interest-notes at ten per cent. on the main note of $40,000.00, and respondent will now show that, under the laws of Alabama, "All contracts for the payment of interest upon the loan or forbearance of goods, money, things in auction, or upon any contract whatever at a higher rate than eight per cent., are usurious, and cannot be enforced, except as to the principal; and if any interest has been paid, the same must be deducted from the principal, and judgment rendered for the balance only." And respondent relies upon the said defence of usury and the said law of Alabama as fully as though the same was specially pleaded.

Further answering, respondent admits that the legal rate of interest in Alabama is eight per cent., and that said notes, on their face, were to bear interest at the rate of eight per cent. after their maturity until paid; and he insists that, so far as said five interest notes of $4,000 each were concerned, the stipulation that they should bear interest at eight per cent. after maturity was to compound interest on the ten per cent. of interest which they represented, as above set forth. Respondent admits that for the purpose of securing the payment of said notes, he did, on the 4th Nov., 1862, execute a deed of trust to his codefendant, Walker, conveying the lands described in the bill, they being the same lands before that time sold and conveyed by the said Vasser to respond-
19 ent, and said deed of trust also conveyed said negro slaves, about ninety in number, which had been likewise sold and conveyed by said Vasser to respondent by deed, in which the said Vasser covenanted that he would "warrant and defend the title to all the slaves to respondent against the lawful claims of all persons whatever." A copy of said deed and warranty will be produced on the hearing. It will be seen from the said deed of trust or mortgage, a copy of which is filed as an exhibit to the bill, that it was agreed that, until default in payment, respondent was to be allowed "to keep possession of said land and slaves," and the said trustee was not to take possession of the same, even after said notes became due, unless notified in writing to do so by said Vasser. The object of these stipulations was to enable respondent, by the use of said property, to make money with which to pay off the

notes secured, and yet respondent will show that, on or about the 4th day of January, 1863, which was only a few days after the confederate army had been defeated at Murfreesboro', Tennessee, and were understood to be in full retreat southwardly, and when it was supposed by every one in the neighborhood of said plantation that said confederate army would retreat as far south as the Tennessee River, and that the sections of country in which said plantation was situated would be exposed to the devastation and demoralization of a battle-ground, respondent determined to remove said slaves to some point south of the Tennessee, where he would employ them to an advantage; and when he had obtained their full consent to go with him,
20 and they had proceeded some distance on their route, the said Vasser went among them, and, by exercising his influence and persuasions as their former master, and by falsely representing to them that respondent had no right to take them South, induced them to refuse to go *no* further, they all turned back, and this respondent was prevented from making $12 or $15,000 per year until the end of the war, which he could have realized from their labor had it not have been for such wrongful and officious interference on the part of said Vasser; and respondent insists that he has a right to an equitable set-off or recoupment against complainant, to the extent of the injury upon him by the said Vasser as aforesaid. It is true, as alleged in the bill, that "other property besides the land conveyed in the deed of trust was lost to the trust and lost to respondent while in the possession of respondent, and its loss is mainly owing to the officious intermeddling of the said Vasser." It is true that said mortgage provided that if all of said notes were paid as they fell due, said conveyance should be void, but if not, then said Walker, as trustee, might take possession of said property, and sell the same and appropriate the proceeds as charged in the bill. It is also true that said mortgage waives the equity of redemption in the event of a sale of the land, as charged in the bill. Respondent admits that said mortgage was duly recorded as charged, and a copy of it filed as an exhibit to the bill is correct. Respondent insists that said mortgage was and is invalid and without consideration, not only for the reasons above set forth as affecting the original contract and notes upon which it was based, but from the further
21 fact that, at the date of the execution and registration of said mortgage, respondent was, and for years before had been, a citizen and resident of the city of Nashville, then in permanent occupation of the United States military forces, and had to procure a pass from the United States military commander of Nashville to enable him to go out to Pulaski, Tennessee, at which place said mortgage was executed, and at the same time Vasser was, as above shown, a resident and citizen of Athens, Alabama, and the said Walker, trustee, was a resident and citizen of Pulaski, Giles County, Tennessee, both of which places were then in the occupation of said confederates or insurgents aforesaid; and respondent insists that the execution of said mortgage was in violation of the non-intercourse acts of Congress aforesaid and of the general laws of the land, and he relies upon this defence as fully as though the same was specially pleaded.

Further answering, respondent says that he has no knowledge, information, and belief as to whether said notes were placed in the hands of said Walker for safekeeping or for collection as they fell due, or as to whether, a short time before the war closed, or at any other time, they were destroyed in the safe of said Walker in the town of Pulaski; and, so far as any of said facts may affect his rights, he demands strict proof.

He denies that clause "that no part of them has ever been paid;" on the contrary, he has from time to time made large payments, and is entitled to various offsetts, enough to nearly pay the original principal of forty thousand dollars. He files herewith, as Exhibit
22 B to this answer, a statement, which he avers to be correct, showing a complete list of said offsets and payments, amounting, as will be seen, to $, all of which he insists shall go in reduction of the principal of $40,000 aforesaid, as he has above shown that no interest is recoverable on the principal. He does not know whether said notes have ever been sold, transferred, assigned, bartered, or exchanged by the said Vasser or by the said Walker, but he supposes they have not been. He supposes that, as far as they could be said to belong to any one, they belonged to said Vasser at his death. Whether the right to collect them passed to complainant upon his qualification as administrator, respondent supposes is the very question to be tried in this case. Whether the complainant has made, or caused the said Walker to make, diligent search for said notes, or whether the same can be found, or as to what the said Walker has informed complainant as to their being destroyed; as to what affidavit the said Walker has made, or as to whether Exhibits "A," "B," "C," "D," "E," & "F" to the bill are substantial copies of said notes, respondent does not know, and has no information or belief; said exhibits are not on file, and he has never seen them.

Respondent denies that all of said notes are due, or unpaid and entitled to no credits, as shown in statement "H," annexed to the bill, or that said statement comprises all the credits to which said notes are entitled. Said statement is not filed with the bill, and respondent has never seen it, but he knows that it cannot now be correct, as he has made various payments since the bill was filed. Respondent
23 would state, however, that he never saw the bill, and never had any knowledge of its contents until since he has made his last payment, and in fact not until the last few days.

It is true that respondent is a non-resident of the State of Tennessee, and a citizen of the State of New York. It is true that said Walker has never given bond as trustee of said trust; has taken no steps to qualify as trustee or to foreclose the trust. It is true that he has never accepted the trust, and does not wish or intend to execute the same. In conclusion, respondent would show that the said Vasser, as he is informed and believes, took said notes off with him, or at least kept himself in the rear of the confederate armies from 1863 until the close of the war, respondent being all the time a citizen and resident of the Federal lines, and, therefore, he insists that no interest could be recovered for that space of time; at all events, that no interest can be collected from the time between the passage of the act of Congress of July 2, 1864, section 4, until the close of the war. And having fully answered, he prays to be hence dismissed with his reasonable costs.

LUKE PRYOR,
SMITH & BAXTER,
Solrs. for Deft.

STATE OF TENNESSEE,
Davidson County:

Personally appeared before me, P. R. Albert, an acting justice of the peace in and for the county and State aforesaid, Richard C. Gardner, the above-named respondent, and made oath that the facts stated in the

foregoing answer are true, to the best of his knowledge, information, and belief.

R. C. GARDNER.

Sworn to and subscribed before me June, 1871.

P. R. ALBERT, *J. P.*

24 *Exceptions to answer.*

JNO. C. BROWN, ADMR.,
v.
R. C. GARDNER ET AL.

The complainant excepts to the answer of defendant because the exhibits made to the answer, and purporting to be filed therewith, are not, in fact, with said answer or on file in the cause.

JNO. C. BROWN,
Solr. for Compl't.

Agreement.

JNO. C. BROWN, ADMR., &C.,
v.
R. C. GARDNER ET ALS.

In this cause it is agreed that early in January, 1863, and just after and in consequence of the defeat of the confederate army at Murfreesboro', Tenn., the defendant, Gardner, started, with about one-half of the negroes purchased of Richard Vasser, to remove them south, to avoid the effects of the anticipated Federal invasion of the county where they were, and with the view of keeping them in the rear of the confederate lines. Arriving at Athens, Ala., the said Vasser opposed their removal, upon the ground that he had a mortgage upon them, and that Gardner had no legal right to remove them, and the said Vasser made the same statement to the negroes that were with the said Gardner, and in consequence thereof the removal of said negroes was abandoned. This agreement is made in lieu of the taking of the depositions of George, Milton, Solomon, and Thomas Gardner, whose depositions were to have been taken at Athens, Ala., on Sept. 4, 1872.

JNO. C. BROWN, *Compl't.*
ED. BAXTER, *for Def't.*

25 *Amended bill.*

JNO. C. BROWN, ADMR.,
v.
RICHARD C. GARDNER ET AL.

To the Hon. William S. Flemming, chancellor, &c., sitting at Pulaski, in and for Giles County, in the State of Tennessee:

JOHN C. BROWN, ADMINISTRATOR OF THE ESTATE of R. W. Vasser, decd., of Giles County,
against
RICHARD C. GARDNER, OF THE STATE OF NEW York, and John C. Walker of Giles County, defendants.

Complainant respectfully represents to your honor, that he filed his original bill in this honorable court, alleging that defendant, Richard C.

Gardner, was indebted to his intestate in sundry promissory notes, made on the day of 186 , the principal amounting to $60,000.00, and that to secure their payment the said Gardner made and executed on the day of 186 , a mortgage or trust-deed, conveying to defendant John C. Walker, as trustee, a tract of land in Giles County, containing about 1,400 acres of land, the boundaries of which are set forth in an exhibit to said bill and the terms and provisions of said deed of trust or mortgage, to which special reference is here now made for particulars.

He alleged, further, that said indebtedness was due, and the major portion thereof unpaid, and that complainant was entitled to a decree for the balance due on said promissory notes, and that he had the right in this honorable court to have said trust-deed or mortgage foreclosed for the payment of said debt. He further alleged that the said John C. Walker had not executed bond or taken the oath as
26 trustee, and was unwilling to execute said trust, and without withdrawing any of said allegations, but re-affirming the same, he makes the following additional allegations, leave of the court having been first had and obtained: He represents that said deed of trust or mortgage was written by the said John C. Walker, and was signed, acknowledged, and executed by the said Richard C. Gardner in the presence of said Walker and Vasser, and then and there, upon the day of its date, delivered to the said John C. Walker, and the notes secured by said deed of trust or mortgage were likewise executed at the same time, and were then and there delivered to the said John C. Walker, as trustee of said trust; and the said John C. Walker accepted and received said trust deed and promissory notes as trustee, and accepted the trust. Now complainant charges that the conveyance aforesaid by the free consent of the said Walker, and the said Walker and said Vasser, conveyed the legal title of said land to said Walker; that the legal title to said land then and there vested in said Walker, and has never been divested. He charges that the said Walker assented to and accepted said trust, and that the legal title now remains in him. And complainant *are* advised that the said Walker is a necessary and material party to this cause, to be divested of the legal title to said land as well as for other purposes. He therefore prays as he has before prayed, and further prays that this be filed as an amendment to his original bill, and that the said Richard C. Gardner and John C. Walker may be made
27 parties defendant and required to answer on or before a rule-day to be designated by your honor; that the court will decree the amount due to complainant, and decree a foreclosure of said mortgage or deed of trust, and that the title, legal and equitable, be divested out of the defendant John C. Walker, and for all other and further relief meet and proper in the premises.

JOHN C. BROWN.

STATE OF TENNESSEE, *Giles County:*

Came complainant and made oath that the allegations in the foregoing amended bill are true to the best of his knowledge, information, and belief.

JNO. C. BROWN.

Subscribed and sworn to before me Sept. 12, 1872.

J. B. STACEY, *C. & M.*

Petition for removal of cause.

In the chancery court of Pulaski, in the 8th chancery district of the State of Tennessee.

JNO. C. BROWN, ADMR.,
v.
RICHARD C. GARDNER ET AL.

To the honorable chancellor presiding and holding the chancery court at Pulaski, Tennessee:

The petition of Richard C. Gardner a citizen and resident of the city and State of New York, respectfully shows unto your honor that your petitioner is one of the two defendants in this suit, and that the same was brought by John C. Brown, administrator of Richard W. Vasser, decd., as plaintiff, on or about the 29 day of January, 1869, in the chancery court to be held in the county of Giles, in the then fourth, but now eighth, chancery district
28 of the State of Tennessee, and the said plaintiff is, and was at the time of bringing this suit, a citizen of the State of Tennessee, and that your petitioner is, and was at the time of *of* bringing this suit, a citizen of the State of New York. And your petitioner further shows that the said plaintiff claims, in a bill filed in this suit, a decree against petitioner for over forty thousand dollars, and that the matter in dispute in this suit, therefore, exceeds the sum of five hundred dollars exclusive of costs. And your petitioner further shows that this suit is brought by the said plaintiff against the petitioner upon the following allegations, in substance: The bill charges that the plaintiff in this suit is the administrator of Richard W. Vasser, deceased. That petitioner executed several notes to said Vasser in his life-time, all dated Nov. 3, 1862, and payable to said Vasser, four of them for five thousand dollars each, due respectively 1st day of Jan'ry, 1863, 1864, 1865, and 1866, and one note for forty thousand dollars, due 1st day of Janu'y, 1867. "That for the purpose of securing the payment of these notes, the petitioner, on the 4th day of November, 1862, made and executed a deed of trust or mortgage to the other defendant, Jno. C. Walker, conveying to him certain lands in Giles County, Tennessee," fully described in the bill, being the same land before that time sold and conveyed by the said Vasser to petitioner; that the said deed of trust or mortgage provides upon its face that, if all of the said notes should be paid as they fell due, that the conveyance should be void; but
29 if not, then the said Walker, as trustee, might take possession of said property, and after giving 20 days' notice in writing in three public places in Giles County, Tennessee, might expose said property, or a sufficiency thereof, to public sale for cash, and, after paying the expenses of the trust, pay said notes and the interest thereon, and that in the event of sale the equity redemption was waived. That said notes were destroyed during the war, and that, with the exception of certain credits, said notes are still due and unpaid. That the said Walker has never given bond as trustee of said trust, and has taken no steps to foreclose the trust, and does not wish or intend to execute the same, and the plaintiff charges that he has the right to come into this court and have the trust closed by the sale of the land aforesaid for cash, and free from the equity of redemption, and have the proceeds applied, after the payment of all costs incident to the foreclosure, to the satisfaction of the balance due on said notes, and the bill prays that certain ex-

hibits filed therewith, which it avers to be substantial copies of said notes destroyed as aforesaid, be taken and received as substantial copies and set up in lieu of the originals; that your honor order said mortgage to be foreclosed by a sale of said land for cash, free from the equity of redemption, and the money arising therefrom applied to the satisfaction of the residue of complainant's debts, and for all other relief meet and proper in the premises. Petitioner will further show that the
30 said Walker never took the oath or filed the inventory required of trustees before entering upon the discharge of their duties as such, and he never accepted said trust as required by the statutes of the State of Tennessee. Your petitioner avers, therefore, that this suit is one in which there can be a final determination of the controversy, so far as it concerns your petitioner, without the presence of the other defendant as a party in this cause. Petitioner further shows that he has filed his answers, but this suit has not yet been tried, and the same is pending for trial in the chancery court at Pulaski, Tennessee. And your petitioner desires to remove this suit, before the trial thereof, into the next circuit court of the United States to be held in the middle district of Tennessee, in the city of Nashville, in pursuance of the provisions of law as contained in the act of Congress approved July 27, 1866, entitled "An act for the removal of causes in certain cases from State courts."

Petitioner is ready and willing to give such good and sufficient security as this court shall direct for his doing all acts and things required to be done by the said provisions of law, upon the removal of a suit into the United States court. And he offers herewith his bond, executed by Sidney Root, of the city, county, and State of New York, and R. H. Gardner, of Nashville, Tennessee, sureties, in the penal sum of one thousand dollars, conditioned that your petitioner shall enter into the next circuit court of the United States to be held in the middle district of Tennessee, at Nashville, Tennessee, on the first day of its session,
31 copies of all process, pleadings, depositions, and other proceedings in this suit, and doing such other appropriate acts as by the said act of Congress are required to be done upon the removal of a suit into the United States court, as good and sufficient surety, according to the said provisions of law, upon the removal of a suit into the United States court. And your petitioner therefore prays that the said bond may be accepted as good and sufficient security according to the said provisions of law, and that the said suit may be removed into the next circuit court of the United States to be held in the middle district of Tennessee, pursuant to said act of Congress, and that no further proceedings be had therein in this court as to this petitioner; and your petitioner will ever pray, &c.

R. C. GARDNER.

STATE OF NEW YORK,
City and County of New York:

Richard C. Gardner, the petitioner in the foregoing petition, being duly sworn, deposes and says, that he has read the petition subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true; and further says not.

RICHARD C. GARDNER.

Sworn to and subscribed before me this 17 Feb'y, 1872.

THOS. SADDLER,
Commissioner for Tennessee in New York.

Agreement filed and entered Sept. 13, 1872.

In this cause, now pending in the chancery court at Pulaski.

JNO. C. BROWN, ADMR.,
v.
R. C. GARDNER ET AL.

32 It is agreed that the defendant, Jno. C. Walker, need not file any answer to the original and amended bills, as no decree is sought against him for costs or anything else, except the mere divestiture of title to the lands mentioned in the pleadings, and this agreement may be entered on the minutes of this court.

JOHN C. BROWN, *Complainant.*

Decree entered October 3, 1872.

JOHN C. BROWN, ADMR.,
v.
RICHARD C. GARDNER ET AL.

This cause was further heard upon the application of the defendant Gardner to remove the same to the circuit court of the United States for the middle district of Tennessee, at Nashville, to be held on the 3rd Monday of October next; and the court being of opinion that petitioner has complied with all the acts of Congress in filing his petition, affidavit, and bond, and that he is a citizen of the State of New York, and complainant is a citizen of the State of Tennessee, and that defendant Walker has no interest in the matters involved, and that the amount involved is over five hundred dollars, exclusive of costs, and that he therefore has a right to have said cause removed as prayed for, it is, therefore, ordered that this cause be removed to the circuit court of the United States to be held at Nashville on the third Monday in October next, and the clerk and master will make out a complete transcript of the record in this cause, and certify the same to the said U. S. court at Nashville, as aforesaid. The court refuses to permit complainant to file
32 his amended bill, as it was presented after the application to remove the cause was made; to which ruling of the court complainant excepts, and tenders his bill of exceptions, making said amended bill a part of the record.

Bond.

We, Richard C. Gardner, of the city of New York, in the State of New York, as principal, and Sidney Root, of the city of New York, State of New York, and R. H. Gardner of Nashville, Tennessee, as sureties, are held and firmly bound unto John C. Brown, administrator of Richard W. Vasser, decd., of Pulaski, Tennessee, in the sum of one thousand dollars lawful money of the United States of America, to be paid to the said John C. Brown, administrator, his successors or assigns, for which payment well and truly to be made, we hereby bind ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this 17 day of Feb'ry, 1872.

Whereas a suit was brought on or about the 29 day of January, 1869, in the chancery court at Pulaski, Tennessee, by the said John C. Brown, administrator, &c., against the said Richard C. Gardner, and the same

is now pending for trial in said court and is removable into the circuit court of the United States for the middle district of Tennessee, at Nashville, under the act of Congress approved July 27, 1866, entitled "An act for the removal of causes in certain cases from the State courts;" and whereas the said Richard C. Gardner has filed his petition in said chancery court at Pulaski, Tennessee, for the removal of said suit into the next circuit court of the United States to be held in the middle district of Tennessee:

34 Now, therefore, the condition of the above obligation is such that if the above bounden Richard C. Gardner, or his legal representatives, shall enter, or cause to be entered, in the circuit court of the United States for the middle district of Tennessee, on the first day of its stated session next ensuing after the order of the said chancery court at Pulaski, Tennessee, for the removal of said suit into said circuit court, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and do, or cause to be done, such other appropriate acts as by the said act of Congress approved July 27, 1866, are required to be done upon the removal of a suit into the United States court, then the above obligation to be void; otherwise to remain in full force and virtue.

RICHARD C. GARDNER. [SEAL.]
S. ROOT. [SEAL.]
R. H. GARDNER. [SEAL.]

STATE OF NEW YORK,
City & County of New York:

Personally appeared before me Sidney Root, the surety in the foregoing obligation named, who, being duly sworn, deposes and says that he is a resident of the State of New York and a householder therein, and is worth the sum of two thousand dollars over all his just debts and liabilities, and exclusive of property exempt from execution by law.

S. ROOT.

Subscribed & sworn to before me this 17 February, 1872.

THOS. SADDLER,
Commissioner for Tennessee.

STATE OF NEW YORK,
City and County of New York:

35 I certify that on the 17th day of Feb'y, 1872, before me personally came Richard C. Gardner and Sidney Root, to me known to be the persons described in, and who executed, the foregoing instrument, and severally acknowledged to me that they executed the same as their own free act and deed, for the uses and purposes therein mentioned.

THOS. SADDLER,
Commr. for Tennessee.

STATE OF TENNESSEE,
Giles County:

I, J. B. Stacey, clerk & master of the chancery court at Pulaski, in said county and State, do hereby certify that the foregoing is a true, perfect, and complete transcript of the records and papers on file in the above cause, as the same appears on file and of record in my office.

In testimony whereof I have hereto set my hand and affixed the seal of my office, at office in Pulaski, this 18 day of November, A. D. 1872.

[SEAL OF OFFICE.] J. B. STACEY, *C. & M.*,
By J. B. STACEY, Jr., *D. C. & M.*

On the 21 day of November, 1872, an entry was made, which is as follows:

JOHN C. BROWN, ADMR.,
v.
RICHARD C. GARDNER ET AL.

In this cause the complainant appears, by his solicitor, and moves the court to dismiss the cause and remand it to the chancery court at Pulaski, from which it has been transferred, upon the ground that it is not a proper case for transfer to this court under the acts of Con-
36 gress relied on, because the application has not been made properly, and the causes assigned for transfer are insufficient, and because J. C. Walker, one of the defendants, who is a material and essential party, is a citizen of the middle district of Tennessee, and the court cannot legally acquire jurisdiction of the necessary parties, and for other good causes, and the motion is continued until the next term for argument. Another ground for the motion is, that the transcript was not filed in this court within the time required by law and the undertaking of the defendant, Gardner.

On the 24 day of November, 1873, a decree was entered, which is as follows:

JOHN C. BROWN, ADMR.,
v.
R. C. GARDNER ET AL.

This cause was heard on this 24th of Nov., 1873, before the Hon. C. F. Trigg, judge, &c., upon a transcript of the record from the chancery court of the State, at Pulaski, and upon the motion of the complainant to dismiss the cause for want of jurisdiction, and upon argument of counsel upon both sides; upon consideration whereof the court is of opinion that it has no jurisdiction of the cause, and doth order, adjudge, and decree accordingly, and that the cause be stricken from the docket. And the court having no jurisdiction of the cause, refuses to give any judgment for costs, or to make any other or further order in the premises. From this decree the defendant, Gardner, prays an appeal to the Supreme Court of the United States, which is granted upon his giving bond and security in the penalty of five hundred dollars conditioned for the payment
37 of costs.

On the 9 day of Sept., 1874, an appeal-bond was filed, which is as follows:

Know all men by these presents that we, Richard C. Gardner, principal, and M. A. McClaugherty and J. J. Pryor, securities, are held and firmly bound unto John C. Brown, administrator of Richard W. Vasser, deceased, in the just and full sum of five hundred dollars, to be paid to the said John C. Brown, administrator of Richard W. Vasser, deceased, certain attorney, executor, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, jointly and severally, by these presents, sealed with our seals and dated this 29 day of November, in the year of our Lord one thousand eight hundred and seventy-three.

Whereas at a circuit court of the United States begun and held for

the middle district at Tennessee, at Nashville, in a suit depending in said court between John C. Brown, administrator of Richard W. Vasser, and Richard C. Gardner, a decree was rendered against the said Gardner, and the said Gardner having applied for and been allowed an appeal to reverse the decree in the aforesaid suit, and having filed in the clerk's office of said court a citation directed to the said John C. Brown, administrater and citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October next:

38 Now, the condition of the above obligation is such, that if the said Richard C. Gardner shall prosecute said appeal to effect, and answer all costs and damages if he fail to make his plea good, then the obligation to be void; else to remain in full force and virtue.

RICHARD O. GARDNER, [SEAL.]
By ED. BAXTER, *Sol'r.* [SEAL.]
M. A. McCAUGHERTY. [SEAL.]
JAS. J. PRYOR. [SEAL.]

Approved:

CONNALLY F. TRIGG, *Judge, &c.*

UNITED STATES OF AMERICA,
Middle District of Tennessee, ss:

I, Edward R. Campbell, clerk of the circuit court of the United States for the middle district of Tennesee, do hereby certify that the foregoing is a true and perfect transcript of the record and proceedings had in said court in the cause of John C. Brown, administrator of Richard W. Vasser, decd., against Richard C. Gardner and John C. Walker, as the same appears of record and on file in my office.

In testimony whereof I have hereto set my hand and affixed the seal of our said court, at Nashville, this 14 day of September, 1874.

[SEAL.] E. R. CAMPBELL,
Clerk U. S. Circuit Court.

(Indorsement on cover:) No. 761. R. C. Garner, appellant, vs. John C. Brown, admr. of Richard W. Vasser, decd. M. Tennessee, C. C. U. S. Filed 9th December, 1874.

IN THE SUPREME COURT OF THE UNITED STATES.

No......

JOHN C. BROWN,

ADMINISTRATOR OF RICHARD W. VASSER, DECEASED,

APPELLEE,

VS.

RICHARD C. GARDENER,

APPELLANT.

Appeal from the Circuit Court of the United States for Middle District of Tennessee.

Brief of ED. BAXTER, Counsel for Appellant.

IN THE SUPREME COURT

OF THE UNITED STATES.

JOHN C. BROWN, Administrator of RICH. W. VASSER, dec'd, Appellee,

vs.

RICHARD C. GARDNER, of New York, and

JOHN C. WALKER, of Giles County, Tenn. Appellants.

BILL filed 29th of January, 1869, and alleges, in substance,

That Richard W. Vasser died intestate in 1864, having his home and residence in the State of Alabama, but having an estate and choses in action in Giles County, Tennessee, and the complainant was appointed and qualified as Administrator in the latter county. That among other assets of the estate of said intestate, complainant found several notes, executed to the intestate in his lifetime by the defendant Richard C. Gardner, all dated the 3rd of November, 1862, and payable to the said Richard W. Vasser, *five* of them for $4,000 each, and due, respectively, on the 1st of January, 1863, 1st of January, 1864, 1st of January, 1865, 1st of January, 1866, *and*

first of January, 1867,* and one other note for $40,000, due 1st of January, 1867. That these notes were all executed in the State of Alabama, upon a contract made also in that State, and, according to the laws of that State, bear interest at the rate of 8 per cent. per annum after their maturity, until paid. That, for the purpose of securing the payment of said notes, the said Richard C. Gardner, on the 4th of November, 1862, made a deed of trust, or mortgage, to the defendant John C. Walker, conveying to him, in mortgage or trust, the following tracts of land in Giles County, Tennessee:

One tract of 176¼ acres;

One tract of 453 acres and 60 poles (for boundaries, see Exhibit O.);

One tract of 674 acres (for boundaries, see Exhibit P);

One tract of 117 acres and 118 poles;

being land before that time sold and conveyed by said Vasser to said Gardner.

That the other property conveyed by said deed was lost to the trust in the possession of the said Gardner.

That said deed provides that if all of said notes are paid as they fall due, the conveyance is to be void; but if the notes are not paid, said Walker, as Trustee, may take possession of said property, and, after giving thirty days' notice in writing, &c., expose a sufficiency thereof to pay said notes, as they fall due, to public sale, and sell the same to the highest bidder for cash, and appropriate the proceeds, first, to the necessary expenses of the trust, and secondly, to the satisfaction of the said notes and interest. The sale to be free from the equity of redemption. That this deed was duly registered in November, 1862, in Book B B, pages 482–3, and is made an Exhibit, marked R. C. G.

That said notes were placed in the hands of Walker for safe keeping, and for collection as they fell due, and

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* Omitted in copy of Bill, in the transcript, but admitted by the answer.

that they were destroyed, a short time before the war closed, in the safe of said Walker, in the town of Pulaski, Tennessee, and that no part of them has been paid, or transferred, and that they belonged to Vasser at his death, and the right to collect them passed to this complainant upon his qualification as Administrator. That complainant has caused diligent search to be made for said notes, and caused the said Walker to make diligent search for them, and the same cannot be found, and said Walker has informed complainant that they were destroyed, and has made affidavit of the fact, which will be filed, if required. Exhibits A, B, C, D, E, and F, are substantial copies of said notes, and Exhibit H shows all the credits to which the notes are entitled.

The Bill further charged that Gardner was a non-resident, and Walker had never given bond as Trustee, nor taken any step to foreclose the trust, and does not wish or intend to execute the same. The Bill prays a foreclosure of said deed by sale of land, &c.

The Bill is sworn to by the complainant.

Exhibits A, B, C, D, E, F, and H, not on file. Exhibit R, C, G, (the deed of trust), is. So are Exhibits O. and P.

The deed of trust conveys, in addition to the tracts of land mentioned in the Bill, about eighty-eight slaves. The deed provides that "said Trustee will not take possession of any of said property after said notes become due, unless notified in writing to do so by said Vasser."

The answer of Richard C. Gardner was filed on the 10th of July, 1871, and admits the residence of Vasser in Alabama, his death, his leaving property in Tennessee, the qualification of complainant as Administrator, and that the notes of respondent were among the choses in action of the intestate in Giles County, as charged. It also admits that the notes, and the contract upon which they were based, were made in Alabama. It

states that the contract was made on the *seventh day of May*, 1862, and that a true copy is filed with the answer, marked Exhibit A. (But no such copy was in fact filed.)

The answer then states that, at the date of the said contract, the complainant was a citizen of Athens, Ala., and respondent of Nashville, Tennessee; that during the late rebellion the United States troops captured the City of Nashville, and permanently held the same, from the 22nd of February, 1862, until the close of the rebellion; that the Confederates held within their military control and occupied Athens, in Alabama, up to May 4, 1862, when they were temporarily dislodged by the United States troops, who held possession from May 4, 1862, to August 29, 1862, when the Confederates regained military possession of the place, and continued in occupation of it until July 19, 1863. Respondent insists that the contract of May 7, 1862 was a violation of the non-intercourse acts of Congress of the 13th day of July, 1861, sec. 5, and 31st day of July, 1861, sec. 1, and of the President's Proclamation in pursuance thereof, and of the general laws of the land; and that the notes and mortgage based thereon are also void. (12 Stat. 237; 12 Stat. 284; 12 Stat. 1262.)

That by the contract Vasser attempted to sell respondent his, said Vasser's, tract of land near Elkton, Tennessee, containing about 1,445 acres, also about 90 negroes on said plantation, and all the stock, corn, fodder, farming utensils, together with all and every kind of property on or belonging to said plantation. Respondent will show that he agreed to pay for said land, slaves and other property $40,000 on the 1st day of January, 1867, and that in the trade the slaves were valued at $20,000, and the land and other property at only $20,000. He insists that, in view of the fact that at the date of said contract the war had commenced, upon which the existence of the institution of slavery depended, the value of said slaves was really nothing, and that by their speedy emancipation they were rendered utterly worthless, and that the

notes, etc., were without consideration or, at all events, that the estate of Vasser should be held accountable for the value of said slaves upon the ground that the warranty of title of said slaves was broken by their emancipation.

He further insists that Vasser demanded, and respondent agreed to pay 10 per cent interest on the $40,000, the consideration for said property, the legal rate of Alabama being only 8 per cent; that it was corruptly and illegally agreed, in order to evade the said interest law of Alabama, that said contract, instead of stating the contract truly as it was made, should represent that the consideration was five notes of $4,000 each, and said note of $40,000, making an apparent consideration of $60,000, whereas the true consideration was $40,000, payable January 1, 1867, with interest, and said five notes were interest notes at 10 per cent. That under the laws of Alabama, "all contracts for the payment of interest upon the loan or forbearance of goods, money, things in action or upon any contract whatever, at a higher rate than eight per cent. are usurious, and cannot be enforced, except as to the principal, and if any interest has been paid the same must be deducted from the principal, and judgment rendered for the balance only."

Respondent admits that the legal rate of interest in Alabama is 8 per cent., and that said notes on their face were to bear interest at that rate after maturity until paid.

He admits that for the purpose of securing the payment of said notes he did, on the 4th of November, 1862, execute to his co-defendant, Walker, a deed conveying the lands described in the bill, they being the same lands before that time sold and conveyed by the said Vasser to Respondent, and the said slaves, about 90 in number, which had been likewise sold and conveyed by Vasser to Respondent, with covenant of warranty of title. That it will be seen from said mortgage or trust deed,

a copy of which is filed as an exhibit to the bill, that it was agreed that respondent should be allowed to keep possession of said land and slaves, and that the Trustee was not to take possession, unless notified in writing so to do by Vasser. That the object of these stipulations was to enable respondent, by the use of said property, to make money with which to pay off said notes. And yet respondent will show that on or about January 4, 1863, which was only a few days after the Confederate army had been defeated at Murfreesboro, he determined to remove said slaves to some point South of the Tennessee, where he could employ them to advantage, and had obtained their consent to the removal, and had proceeded some distance, when the said Vasser went among them, and by exercising his influence as their former master, and by falsely representing to them that respondent had no right to take them South, induced them to refuse to go further, and they turned back, and respondent was prevented from making $12,000 or $15,000 per year until the end of the war, which he could otherwise have done. And respondent insists that he is entitled to an equitable set off or recoupment to the extent of the injury thus inflicted.

It is true that the other property, besides the land, conveyed in said deed of trust, was lost to the trust while in the possession of respondent. That the deed contained the provisions recited in the Bill touching the sale by the Trustee, and that the deed was recorded.

Respondent insists that the deed was void because at the time of its execution he was a citizen of Nashville, Tennessee, then in the possession of the United States forces, and had to procure a pass from the Commander to go to Pulaski, Tennessee, "at which place said mortgage was executed;" and at the same time Vasser was a resident and citizen of Athens, Alabama, and Walker, the Trustee, of Pulaski, both of which places were then in the actual occupancy of the Confederates. The execution of said deed being in violation of the non-intercourse acts of Congress and the general laws of the land.

Respondent has no knowledge, information or belief whether his notes were placed in the hands of Walker and destroyed as charged. He denies that no part of them has been paid, and says, on the contrary, that he has from time to time made large payments, and is entitled to various off sets, enough to pay off the original principal of $40,000. He files, he says, as Exhibit B. to the answer, a statement, which he avers to be correct, showing a complete list of his payments. (No such Exhibit was in fact filed.) Respondent has not seen Exhibit H. to the bill, but he knows that it cannot *now* be a correct statement of his credits *"as he has made various payments since the bill was filed."*

Respondent is a non-resident of Tennessee and a citizen of the State of New York.

Respondent admits that Walker has never given bond as Trustee, and has taken no steps to qualify as Trustee, or to foreclose the trust, and says that he has not accepted the trust and does not wish or intend to execute the same.

He is informed and believs that said Vasser took said notes off with him, or at least kept himself in the rear of the Confederate armies from 1863 until the close of the war; respondent being all the time a citizen and resident within the Federal lines. And he, therefore, insists that no interest can be recovered for that space of time; at all events, that no interest can be collected from the time between the passage of the act of Congress of July 2, 1864, sec. 4, until the close of the war.

The complainant excepts to this answer because the Exhibits mentioned therein, and purporting to be filed therewith, were not in fact filed. (The exception is not dated nor does it appear whether it was ever acted on.)

In September, 1872, an agreement in writing was entered into between the parties, to the effect, "that early in January, 1863, and just after, and in consequence of the defeat of the Confederate arms at Murfreesboro, Tennessee, the defendant, Gardner, started with about one-half of the negroes purchased of Vasser to remove

them South, to avoid the effects of the anticipated Federal invasion of the country where they were, and with the view of keeping them in the rear of the Confederate lines. Arriving at Athens, Alabama, the said Vasser opposed their removal, upon the ground that he had a mortgage upon them, and that Gardner had no legal right to remove them, and the said Vasser made the same statement to the negroes that were with the said Gardner, and in consequence thereof the removal of said negroes was abandoned."

On the 12th of September, 1872, the complainant prepared an amended bill to be filed by leave of the Court, but the Court refused to permit it to be filed, because offered after the application to transfer the case to the Federal Court. The substance of the amendment being that the said deed of trust, or mortgage, was written by the said John C. Walker, and was signed, acknowledged and executed by the said Richard C. Gardner, in the presence of the said Walker and Vasser, and then and there, upon the day of its date, delivered to the said John C. Walker; and the notes secured by said deed of trust or mortgage were likewise executed at the same time, and were then and there delivered to the said John C. Walker as Trustee of said trust, and the said John C. Walker accepted and received said trust deed and promissory notes as Trustee, and accepted the trust, whereby the legal title passed to said Walker to said land, etc.

On the 13th of September, 1872, a written agreement, signed by the complainant, was entered of record, that the defendant, John C. Walker, need not file an answer, as no decree is sought against him for costs, "or anything else, except the mere divestiture of title to the lands mentioned in the pleadings."

On the 3rd of October, 1872, the Chancellor, upon the application of the defendant, Gardner, ordered the cause to be transferred to the United States Court at Nashville.

The petition, on which this order was made, was sworn to before a Commissioner for Tennessee, in New York, on the 17th of February, 1872.

The petition is filed under the Act of July 27th, 1866, entitled, "an act for the removal of causes in certain cases from State Courts." It is based upon the ground that the petitioner is the only material defendant, because the original bill avers: "That the said Walker has never given bond as Trustee of said trust, and has taken no steps to foreclose the trust, and does not wish, or intend, to execute the same," and "has never accepted said trust as required by the statutes of Tennessee."

The transcript was not filed until the 21st of November, 1872, in the United States Court, at Nashville.

On the 21st of November, 1872, the complainant moved to dismiss the cause, and remand it to the Chancery Court upon the following grounds:

1. That the transcript was not filed in this court within the time required by law, and the undertaking of the defendant, Gardner. (Complainant directs this ground shall not be insisted on.)
2. That this is not a proper case for transfer to this Court, under the Act of Congress, relied on.
3. That the application has not been made properly.
4. That the causes assigned are insufficient.
5. That J. C. Walker, who is a defendant, and a citizen of Tennessee, is a material and essential party, and the Court cannot, therefore, acquire jurisdiction of the parties.
6. Other good causes.

On the 24th of November, 1873, the cause was heard in the United States Circuit Court, at Nashville, and upon the motion of complainant, to dismiss the cause for want of jurisdiction, the Court was of opinion that it had no jurisdiction of the cause, ordering that this cause be stricken from the docket. From this decree the defendant, Gardner, prayed an appeal to this Court, which was granted, upon his giving bond and security, which has been done.

ASSIGNMENT OF ERRORS.

The appellant, Richard C. Gardner, respectfully submits that the decree rendered in this cause on the 24th Nov., 1873, by the Honorable Circuit Court of the United States for the Middle District of Tennessee, is erroneous

1st. In deciding that it had no jurisdiction of the cause.

2d. In ordering that the case be stricken from the docket.

ARGUMENT.

I. The question as to the right of the appellant to have the cause removed from the State Court to the Circuit Court of the United States, must be determined by the record *as it stood when the application for the removal was made.*

If the appellant made out a proper case for the removal of the suit in the application made by him to the State Court for that purpose, "it was then the duty of the State Court to accept the security and proceed no further in the cause;" it consequently would have erred had it allowed the amended bill to be filed which was presented by the appellee.[1] As, however, the State Court refused to allow the amended bill to be filed, it is, though copied into the transcript, no part of the record, and cannot be looked to for any purpose in this investigation. We propose, therefore, in what we have to say hereafter, to discuss the question upon the record as it stood when the application to the State Court was made.

II. We insist that the suit is one, "in which there can be in the United States Circuit Court a final determination of the controversy, as far as it concerns the appellant, without the presence of his co-defendant Walker as a party in the cause;" and therefore that the appel-

[1] 15 How., 198, Kanouse vs. Martin.

lant had the right to have the cause removed from the State Court under the act of Congress passed July 27, 1866.[1]

1st. In Armstrong *vs.* Morrill,[2] this Court held, that the mere making of a deed to one as trustee, does not vest the party named as trustee with the title, if he never in any form have accepted the trust. So, the Supreme Court of Tennessee in the case of Goss *vs.* Singleton[3] say that the law does not force any one to accept the gift of an estate, whether made in trust or otherwise; and therefore it is competent for the person appointed trustee to refuse both the estate and the office attached to it, provided he has done no act to deprive himself of that right. In the original bill filed by the appellant, is it nowhere stated that Walker, the party named as trustee, ever accepted the trust; he did not sign or witness the deed; he has never given bond as trustee; he has taken no steps to foreclose the trust; and "does not wish or intend to execute the same" as is expressly admitted by the appellee. The appellant, Gardner, in his answer to the original bill, and also in his petition for removal, expressly avers that Walker, the party named as trustee, has never accepted the trust.

But even if we could look to the amended bill which the Chancellor refused to allow to be filed, we find that the only *facts* set forth as evidence that Walker did accept the trust, is that the deed was written by him; that it was signed, acknowledged, and executed by the parties in his presence, and then and there delivered to him, together with the notes secured by it, and that he accepted and received the same as trustee.

Mr. Burrill says that "the acceptance must be actually signified by the assignee" that a mere "delivery of the instrument without acceptance is nugatory" and that

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[1] 14 U. S. Stat. at Large, pps. 306, 307.

[2] 14 Wall, p. 120.

[3] 2 Head, p. 77.

"the mere taking the instrument into his hands and retaining it amounts to nothing."[1]

But conceding for the sake of argument that such acts would amount to an acceptance under the common law, in the absence of other circumstances appearing in this case, we say that it does not under the statute laws of Tennessee, as they stand at present.

The Code of Tennessee provides as follows:[2]

"Every trustee, or assignee, to whom property exceeding the value of five hundred dollars is conveyed in trast for the benefit of creditors, sureties, or other persons, unless by them released in writing from the obligations hereinafter prescribed, before entering upon the discharge of his duty, shall give bond with two or more good and sufficient sureties, in an amount equal to the value of the property mentioned in the deed, or assignment, payable to the State of Tennessee, conditioned for the faithful performance of all the duties imposed upon him by law, and by the terms of the deed or assignment; and take, and subscribe before the Clerk of the County Court of the county in which he resides, an oath to the effect,

1st. That he will honestly and faithfully execute and perform all the duties imposed upon him by law and by the deed of assignment.

2d. That he will cause to be made a full, true, and perfect inventory, of all and singular the goods, chattels, lands, or other assets contained in said trust deed or assignment, which have or may come into his hands, or into the hands of any other person for him.

3d. And that he will return, or cause to be filed in the office of the Clerk, a full and true account of all sales of said effects, and of all moneys received or securities taken. Acts 1855-6, ". . . and "if any trustee or assignee fail or refuse to comply with these provisions, the County Court, upon application of any person interested,

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[1] Burrill on Assignments, (2 Ed,) p. 305.
[2] Code Tenn., s. 1974.

shall in room of the delinquent, appoint a trustee or receiver, who, upon executing the bond, and taking the oath aforesaid, may execute the said trust or assignment.[1]

In the case of Mills *vs.* Haines,[2] the Supreme Court of Tennessee decided that a trust shall not fail for want of a trustee, or by reason of his neglect or default, and therefore a failure of the trustee to comply with the terms of the statute above quoted, *will not impair the validity of the trust.* It would furnish a sufficient reason for displacing him and appointing another, but would not defeat the trust.

In Barcroft, Beaver & Co., *vs.* Snodgrass,[3] the Clerk of the County Court had been named as trustee in the deed, and had given bond, and taken the oath, before his own deputy—this the Court decided he could not do. They held that the trust should not fail for the want of a trustee; but they also held that as the principal Clerk could not qualify before his own deputy, he was "*not legally competent to act as trustee,*" unless he was exonerated from giving bond and taking the oath by the beneficiaries in the trust.[4]

To the same effect is Furman & Co. *vs.* Fisher,[5] Vance *vs.* Smith,[6] and Williams *vs.* Gideon,[7] the full extent of all of the cases is, that the trust shall not fail for want of a trustee; and we do not insist that it shall. So far as this point is concerned, we admit that the deed of trust executed by Gardner is valid, whether Walker qualified according to law or not, and we admit that it would be equally valid, whether he accepted, or did not accept. We concede that a trust may be valid as be-

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[1] Code Tenn., s. 1977.
[2] 3 Head, 332.
[3] 1 Cold., 430.
[4] 1 Cold., 435.
[5] 4 Cold., 626.
[6] 2 Heisk., 343.
[7] 7 Heisk., 617.

tween the maker and beneficiaries, though the party named as trustee may expressly refuse to accept. But we say that the only way in which a party named as trustee, can *legally* signify his acceptance, is by giving bond and taking the oath required by the Code; that he cannot be heard to say that he has accepted a trust when he has failed to do that, which the statute says he shall do, "before entering upon the discharge of his duty;" when he stands before the law, as a "delinquent,"[2] or as one "not legally competent to act,"[3] and liable at any moment to be formally displaced and to have another appointed in his stead.[4]

In Maxwell *vs.* Finnie,[5] the inferior Court had appointed a trustee without requiring from him bond and security. The Supreme Court held that it was error to appoint him "without requiring of him as a *condition precedent* to his acting as trustee, bond and security;" they say furthermore, that the maker of the deed, who has paid a portion of the debts secured, and who is entitled to the surplus, "has a direct interest in seeing who should be appointed trustee and that proper bonds were taken with suretp."[6]

We have in Tennessee a similar statute relating to executors and administrators; it is as follows: "No person shall presume to enter upon the administration of any deceased person's estate, until he has obtained letters of administration, or letters testamentary." Act of 1715.[7] And "theClerk shall, before delivering the letters of administration, or letters testamentary to the representative, administer to him, if an executor, an oath for performing the will of the deceased, and if an ad-

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1 Code Tenn., s. 1974.
2 Code Tenn, s. 1977.
3 1 Cold., 435.
4 3 Head, 332.
5 6 Cold., 439.
6 6 Cold., 438. Maxwell vs. Finnie.
7 Code Tenn., s. 2201.

ministrator an oath for the faithful performance of his duty." Act 1715. [1]

"The Clerk shall also, before issuing the letters testamentary, or of administration, take from the executor or administrator, his bond with two or more sufficient sureties, in a penalty of double the value of the estate of the deceased, payable to the State." [2]

In the case of Martin *vs.* Peck, [3] the Supreme Court of Tennessee, construing these provisions, held that "before the executor qualifies, and gives bond and security, he can do no valid act." In Baldwin *vs.* Buford, [4] they hold that by the laws of Tennessee "the executor *acquires no title*, or power, over the goods and chattels of the testator, by mere force of the will;" * * "until the will be proved in the proper Court, the executor enters into bond and security, and takes the oath well and truly to administer, the goods and chattels remain in custody of the law, subject to the jurisdiction of the County Court." In Fay *vs.* Reagen, [5] they say "it is well settled under our law, that until after his qualification, an executor stands upon the same footing with an administrator, and that until he has given bond, and been duly qualified as required by law, the goods and chattels of the testator remain in the custody of the law, and he can do no valid act relating to the administration thereof."

We submit that the statutes in relation to trustees, work the same changes in our laws in relation to them, that are made in regard to executors; that as at common law the trustee got his title from the deed, and the executor got his title from the will, so under our present law both of them must look to their qualifications before the County Court, for their title. That the objects of both statutes were the same, the protection of the trust

[1] Code Tenn., s. 2221.
[2] Code Tenn., s. 2222.
[3] 2 Yerg., 298.
[4] 4 Yerg., 20.
[5] 2 Sneed, 203.

fund for those interested in it, and that, therefore, the rule of construction must be the same.

If we be right in this position, even the naked legal title to the property in controversy in this case, never passed to Walker, and he was neither a necessary nor a proper party, in either the State or Federal Court.

2d. We insist that so far from Walker having accepted the trust, his conduct amounts to an express disclaimer. Mr. Perry in his work on Trusts says that, "if a person appointed trustee effectually disclaims, it is as if he had never been named in the instrument. All parties are placed in the same situation in respect to the trust property as if his name had not been inserted in the deed, or will. Therefore if one of several trustees disclaims, the entire estate will vest in the remaining trustee, or trustees; and if all the trustees, or a sole trustee disclaims, the estate will vest in the heir of the devisor where the trust is created by last will and testament.[1] But where, as in this case, the trust is created by deed, and the maker of the deed is still alive, the legal title having failed to vest in the party named as trustee, it necessarily remains in the maker of the deed, subject to the trusts. For it is well settled that "the holder of the legal title, and the absolute interest in property, may convert *himself* into a trustee by making a valid declaration of trust upon good consideration; or if he conveys the property by some conveyance which is inoperative in law, equity will hold him as trustee.[2]

"It will be seen from this, that a disclaimer operates retrospectively,"[3] and is regarded "as evidence that the donee never assented, and consequently that the estate never vested in him."[4]

"A trust may be repudiated without an express disclaimer, as by evidence of the conduct of the party

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[1] Perry on Trusts, s., 273; 2 Head, (Tenn.,) 77, 78. Goss vs. Singleton

[2] Perry on Trusts, s. 38, s. 240.

[3] Perry on Trusts, s. 273.

[4] Perry on Trusts, s. 270.

amounting to a refusal of the office, or by any conduct inconsistent with an acceptance, and *a disclaimer may be presumed after a long neglect to qualify or refusal to act.*"[1]

Mr. Perry says that "in nearly all the United States, there are statutes upon the subject which require, that wills shall be presented for probate, and that executors and trustees under them shall give bonds for the faithful discharge of their duties. Where such statutes are in force executors or *trustees* have *no power or authority to act* without appointment by the Probate Court, *and a refusal or neglect to qualify by giving bond will be considered a refusal and disclaimer of the trust.*"[2] The same doctrine is laid down by the Supreme Court of Tennessee in Robertson *vs.* Gaines,[3] and in Drane *vs.* Bayless.[4]

If we be right in this position, it follows, that Walker having disclaimed the trust, the legal title never passed to him, and he was not a necessary party in either the State or Federal Court; the legal title not having passed to Walker remained in Gardner, who stands seized of it, subject to, and for the uses of, the trust; and as he is before the Court, and the representative of the only beneficiary in the deed is before the Court, there is nothing in the way of its doing complete and final justice between the parties.

In the case of the Batesville Institute *vs.* Kaufman,[5] decided by this Court in 1873, a lien upon certain property had been conveyed to one Gibbs by deed in trust to pay debts; he had died and no successor had been appointed in his stead, nor does it appear that his legal representative had been brought before the Court. Upon demurrer to a bill filed by the beneficiaries to enforce the lien, it was held that the Court has power to appoint a new trus-

[1] Perry on Trusts, s. 270.
[2] Perry on Trusts, s. 262.
[3] 2 Humph, 381.
[4] 1 Humph, 186.
[5] 18 Wall, 151.

tee and to compel the performance of the trust by him," or that it was "equally within the power of a Court of Equity to decree and enforce the execution of the trust through its own officers and agents without the intervention of a new trustee."

In such cases it is not necessary to bring before the Court the party named as trustee, nor his heirs. Barbour on Parties says expressly that "a trustee named in a will who has refused the trust, is not a necessary party."[1] So he says that if the trustee has assigned his trust absolutely, unless the assignment is a breach of trust, the trustee need not be made a party.[2]

III. But if it were conceded that the naked legal title is still outstanding in Walker, and that it must be divested out of him before a sale of the trust property can be made, still we say that his presence is not necessary in the Circuit of the United States.

The act of Congress of July 27, 1866,[3] was passed to alter the law, which as it previously stood, was to the effect that to authorize the removal of a cause, all the plaintiffs must be citizens of the State in which the suit is brought, and all the defendants must be citizens of some other State or States.[4] Under the old law it was sometimes attempted to defeat the right of removal, by joining some formal or nominal resident defendant, with the real defendant, who was a non-resident; it therefore became necessary for this Court to hold, as it did in a number of cases, that the real parties in interest had the right of removal, though they were joined with other mere

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[1] Barbour on Parties, p. 531.

[2] Barbour on Parties, p. 535. See also 1 Pet. (306) Mechanics Bank vs. Seton.

[3] 14 U. S. Statute, p. 306, 307.

[4] 1 Brightly Fed. Dig., p. 125, s. 187, and cases cited.

formal parties, who were citizens of the same State with themselves,[1] the Court proceeding upon the ground, that if the case might be completely decided as between the litigant parties, an interest in some other person who could not be reached by process, should not defeat a decree.[2] The old law even as construed by this Court, did not go far enough in the opinion of Congress; it was seen that many cases might occur, in which the resident defendants, (though they could not be classed as merely formal or nominal parties, and in fact might be regarded as proper or even necessary parties for certain purposes in the suit) would have no real personal interest in the controversy, that perhaps was of vital importance to the non-resident co-defendant. Considerations of local prejudice and popular clamor, might be such that the non-resident would be ruined were he forced to submit his rights to the decision of a State tribunal, where they depended upon his assuming certain legal positions in his defense, which were regarded as odious in that particular locality. Therefore it was that Congress passed the act of July 27, 1866, giving a non-resident the right of removal whenever "the suit was one in which there can be a final determination of the controversy, *so far as it concerns him*, without the presence of the other defendants as parties in the cause." A resident might attach the property of a non-resident in the hands of a resident, making them both defendants, and claiming a large debt to be due from the non-resident; clearly the resident defendant who had the property in his possession would be a proper, and even a necessary party; but suppose that the non-resident should appear and admit that the property was his, and that it was liable to any decree that the complainant might be able to obtain against him, and throw his whole defense upon the ground that he did not owe the complainant anything; here the "*contro-*

[1] 1 Brightly Fed. Dig., p. 125, s. 188, and cases cited.
[2] 1 Brightly Fed. Dig., p. 304, s. 608, and cases cited.

versy, so far as it concerns him" would be confined to the question of debt or no debt, and any Court having cognizance of an action of debt could make a "final determination" of that controversy; the resident defendant in whose possession the property was attached, would become a mere stakeholder, a disinterested spectator of the controversy that was being waged by the real litigants.

To hold that in such a case the non-resident should be deprived of his right of removal would not only deprive him of his constitutional right to a trial in the Courts of the United States, but it would go far towards preventing citizens of one State from investing or using their capital in other States, and thus restrain and cripple the operations of commerce.

Take now the case actually before the Court. Gardner a non-resident, conveys his property in Tennessee to Walker, a resident of that State, in trust to secure certain notes mentioned in the deed. The owner of said notes files his bill against Gardner, the assumed debtor, and Walker, who it is alleged, holds the technical legal title.

Walker does not pretend to claim any interest whatever in the notes; at the very most, he is a mere disinterested stake-holder of the naked legal title; the holder of the notes makes no claim against him; he is not mentioned in the prayer of the bill, except to pray process against him, and it does not so much as ask that the legal title be divested out of him; he has taken no interest in the trust, nor in the suit, and has not even answered the bill. Gardner makes no issue with him, and there is no dispute of any kind between them.

The only real controversy that exists in the case is between the holder of the notes and Gardner, and that controversy, though involving several questions, is reduced to the single issue, whether there is any and what amount due under the deed of trust; and surely, in that controversy, Walker has neither an inclination nor a right to be heard. If the controversy is decided against

Gardner, he concedes that the United States Court has the same power to foreclose the trust, as the State Court, and if it be necessary to have a formal divestiture of title out of Walker, and if it should so be that the United States Court could not decree it, that Court can at least make a "final determination of the controversy, so far as it concerns" Gardner, and having fixed the amount due from him, and declared that his interest in the land shall be sold to pay it, it can leave the complainant to apply to the State Court for the removal of the trustee, or for a sale of the property. That such a proceeding was contemplated by the act of Congress, is manifest from the provision, "that a removal of the same, as against the defendant petitioning therefor, into the United States Court, shall not be deemed to prejudice or take away the right of the plaintiff to proceed at the same time with the suit in the State Court as against the other defendants, if he shall desire to do so." [1] We suspect however, that if the appellee succeeds in obtaining a decree in this Court, he will prefer the shorter and plainer course marked out for him in the case of the Batesville Institute vs. Kaufman, [2] cited above, and ask this Court to "enforce the execution of the trust, through its own officers and agents, without the intervention of a new trustee."

ED. BAXTER,
Counsel for Appellant.

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[1] 14 U. S. Stat., p. 307.
[2] 18 Wall, 151.

IN THE SUPREME COURT

OF THE UNITED STATES.

JOHN C. BROWN, Administrator of RICH. W. VASSER, dec'd, Appellee,

vs.

RICHARD C. GARDNER, of New York, and JOHN C. WALKER, of Giles County, Tenn. Appellants.

WM. F. & HENRY COOPER, Solicitors for Appellee.

Nashville Union and American Print.

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vs.

RICHARD C. GARDNER, of New York, and JOHN C. WALKER, of Giles County, Tenn. Appellants.

BILL filed 29th of January, 1869, and alleges, in substance,

That Richard W. Vasser died intestate in 1864, having his home and residence in the State of Alabama, but having an estate and choses in action in Giles County, Tennessee, and the complainant was appointed and qualified as Administrator in the latter county. That among other assets of the estate of said intestate, complainant found several notes, executed to the intestate in his lifetime by the defendant Richard C. Gardner, all dated the

3rd of November, 1862, and payable to the said Richard W. Vasser, *five* of them for $4,000 each, and due, respectively, on the 1st of January, 1863, 1st of January, 1864, 1st of January, 1865, 1st of January, 1866, *and first of January*, 1867,* and one other note for $40,000, due 1st of January, 1867. That these notes were all executed in the State of Alabama, upon a contract made also in that State, and, according to the laws of that State, bear interest at the rate of 8 per cent. per annum after their maturity, until paid. That, for the purpose of securing the payment of said notes, the said Richard C. Gardner, on the 4th of November, 1862, made a deed of trust, or mortgage, to the defendant John C. Walker, conveying to him, in mortgage or trust, the following tracts of land in Giles County, Tennessee:

One tract of 176¼ acres;

One tract of 453 acres and 60 poles (for boundaries, see Exhibit O.);

One tract of 674 acres (for boundaries, see Exhibit P);

One tract of 117 acres and 118 poles;

being land before that time sold and conveyed by said Vasser to said Gardner.

That the other property conveyed by said deed was lost to the trust in the possession of the said Gardner.

That said deed provides that if all of said notes are paid as they fall due, the conveyance is to be void; but if the notes are not paid, said Walker, as Trustee, may take possession of said property, and, after giving thirty days' notice in writing, &c., expose a sufficiency thereof to pay said notes, as they fall due, to public sale, and sell the same to the highest bidder for cash, and appropriate the proceeds, first, to the necessary expenses of the trust, and secondly, to the satisfaction of the said notes and interest. The sale to be free from the equity of redemption. That this deed was duly registered in November, 1862, in

* Omitted in copy of Bill, in the transcript, but admitted by the answer.

Book B B, pages 482–3, and is made an Exhibit, marked R. C. G.

That said notes were placed in the hands of Walker for safe keeping, and for collection as they fell due, and that they were destroyed, a short time before the war closed, in the safe of said Walker, in the town of Pulaski, Tennessee, and that no part of them has been paid, or transferred, and that they belonged to Vasser at his death, and the right to collect them passed to this complainant upon his qualification as Administrator. That complainant has caused diligent search to be made for said notes, and caused the said Walker to make diligent search for them, and the same cannot be found, and said Walker has informed complainant that they were destroyed, and has made affidavit of the fact, which will be filed, if required. Exhibits A, B, C, D, E, and F, are substantial copies of said notes, and Exhibit H shows all the credits to which the notes are entitled.

The Bill further charged that Gardner was a non-resident, and Walker had never given bond as Trustee, nor taken any step to foreclose the trust, and does not wish or intend to execute the same. The Bill prays a foreclosure of said deed by sale of land, &c.

The Bill is sworn to by the complainant.

Exhibits A, B, C, D, E, F, and H, not on file. Exhibit R, C, G, (the deed of trust), is. So are Exhibits O. and P.

The deed of trust conveys, in addition to the tracts of land mentioned in the Bill, about eighty-eight slaves. The deed provides that "said Trustee will not take possession of any of said property after said notes become due, unless notified in writing to do so by said Vasser."

The answer of Richard C. Gardner was filed on the 10th of July, 1871, and admits the residence of Vasser in Alabama, his death, his leaving property in Tennes-

see, the qualification of complainant as Administrator, and that the notes of respondent were among the choses in action of the intestate in Giles County, as charged. It also admits that the notes, and the contract upon which they were based, were made in Alabama. It states that the contract was made on the *seventh day of May*, 1862, and that a true copy is filed with the answer, marked Exhibit A. (But no such copy was in fact filed.)

The answer then states that, at the date of the said contract, the complainant was a citizen of Athens, Ala., and respondent of Nashville, Tennessee; that during the late rebellion the United States troops captured the City of Nashville, and permanently held the same, from the 22nd of February, 1862, until the close of the rebellion; that the Confederates held within their military control and occupied Athens, in Alabama, up to May 4, 1862, when they were temporarily dislodged by the United States troops, who held possession from May 4, 1862, to August 29, 1862, when the Confederates regained military possession of the place, and continued in occupation of it until July 19, 1863. Respondent insists that the contract of May 7, 1862 was a violation of the non-intercourse acts of Congress of the 13th day of July, 1861, sec. 5, and 31st day of July, 1861, sec. 1, and of the President's Proclamation in pursuance thereof, and of the general laws of the land; and that the notes and mortgage based thereon are also void. (12 Stat. 237; 12 Stat. 284; 12 Stat. 1262.)

That by the contract Vasser attempted to sell respondent his, said Vasser's, tract of land near Elkton, Tennessee, containing about 1,445 acres, also about 90 negroes on said plantation, and all the stock, corn, fodder, farming utensils, together with all and every kind of property on or belonging to said plantation. Respondent will show that he agreed to pay for said land, slaves and other property $40,000 on the 1st day of January, 1867, and that in the trade the slaves were valued at $20,000, and

the land and other property at only $20,000. He insists that, in view of the fact that at the date of said contract the war had commenced, upon which the existence of the institution of slavery depended, the value of said slaves was really nothing, and that by their speedy emancipation they were rendered utterly worthless, and that the notes, etc., were without consideration or, at all events, that the estate of Vasser should be held accountable for the value of said slaves upon the ground that the warranty of title of said slaves was broken by their emancipation.

He further insists that Vasser demanded, and respondent agreed to pay 10 per cent interest on the $40,000, the consideration for said property, the legal rate of Alabama being only 8 per cent; that it was corruptly and illegally agreed, in order to evade the said interest law of Alabama, that said contract, instead of stating the contract truly as it was made, should represent that the consideration was five notes of $4,000 each, and said note of $40,000, making an apparent consideration of $60,000, whereas the true consideration was $40,000, payable January 1, 1867, with interest, and said five notes were interest notes at 10 per cent. That under the laws of Alabama, "all contracts for the payment of interest upon the loan or forbearance of goods, money, things in action or upon any contract whatever, at a higher rate than eight per cent. are usurious, and cannot be enforced, except as to the principal, and if any interest has been paid the same must be deducted from the principal, and judgment rendered for the balance only."

Respondent admits that the legal rate of interest in Alabama is 8 per cent., and that said notes on their face were to bear interest at that rate after maturity until paid.

He admits that for the purpose of securing the payment of said notes he did, on the 4th of November, 1862,

execute to his co-defendant, Walker, a deed conveying the lands described in the bill, they being the same lands before that time sold and conveyed by the said Vasser to Respondent, and the said slaves, about 90 in number. which had been likewise sold and conveyed by Vasser to Respondent, with covenant of warranty of title. That it will be seen from said mortgage or trust deed, a copy of which is filed as an exhibit to the bill, that it was agreed that respondent should be allowed to keep possession of said land and slaves, and that the Trustee was not to take possession, unless notified in writing so to do by Vasser. That the object of these stipulations was to enable respondent, by the use of said property, to make money with which to pay off said notes. And yet respondent will show that on or about January 4, 1863, which was only a few days after the Confederate army had been defeated at Murfreesboro, he determined to remove said slaves to some point South of the Tennessee, where he could employ them to advantage, and had obtained their consent to the removal, and had proceeded some distance, when the said Vasser went among them, and by exercising his influence as their former master, and by falsely representing to them that respondent had no right to take them South, induced them to refuse to go further, and they turned back, and respondent was prevented from making $12,000 or $15,000 per year until the end of the war, which he could otherwise have done. And respondent insists that he is entitled to an equitable set off or recoupment to the extent of the injury thus inflicted.

It is true that the other property, besides the land, conveyed in said deed of trust, was lost to the trust while in the possession of respondent. That the deed contained the provisions recited in the Bill touching the sale by the Trustee, and that the deed was recorded.

Respondent insists that the deed was void because at the time of its execution he was a citizen of Nashville,

Tennessee, then in the possession of the United States forces, and had to procure a pass from the Commander to go to Pulaski, Tennessee, "at which place said mortgage was executed;" and at the same time Vasser was a resident and citizen of Athens, Alabama, and Walker, the Trustee, of Pulaski, both of which places were then in the actual occupancy of the Confederates. The execution of said deed being in violation of the non-intercourse acts of Congress and the general laws of the land.

Respondent has no knowledge, information or belief whether his notes were placed in the hands of Walker and destroyed as charged. He denies that no part of them has been paid, and says, on the contrary, that he has from time to time made large payments, and is entitled to various off sets, enough to pay off the original principal of $40,000. He files, he says, as Exhibit B. to the answer, a statement, which he avers to be correct, showing a complete list of his payments. (No such Exhibit was in fact filed.) Respondent has not seen Exhibit H. to the bill, but he knows that it cannot *now* be a correct statement of his credits *"as he has made various payments since the bill was filed."*

Respondent is a non-resident of Tennessee and a citizen of the State of New York.

Respondent admits that Walker has never given bond as Trustee, and has taken no steps to qualify as Trustee, or to foreclose the trust, and says that he has not accepted the trust and does not wish or intend to execute the same.

He is informed and believs that said Vasser took said notes off with him, or at least kept himself in the rear of the Confederate armies from 1863 until the close of the war; respondent being all the time a citizen and resident within the Federal lines. And he, therefore, insists that no interest can be recovered for that space of time; at all events, that no interest can be collected from the time between the passage of the act of Congress of July 2, 1864, sec. 4, until the close of the war.

The complainant excepts to this answer because the Exhibits mentioned therein, and purporting to be filed therewith, were not in fact filed. (The exception is not dated nor does it appear whether it was ever acted on.)

In September, 1872, an agreement in writing was entered into between the parties, to the effect, "that early in January, 1863, and just after, and in consequence of the defeat of the Confederate arms at Murfreesboro, Tennessee, the defendant, Gardner, started with about one-half of the negroes purchased of Vasser to remove them South, to avoid the effects of the anticipated Federal invasion of the country where they were, and with the view of keeping them in the rear of the Confederate lines. Arriving at Athens, Alabama, the said Vasser opposed their removal, upon the ground that he had a mortgage upon them, and that Gardner had no legal right to remove them, and the said Vasser made the same statement to the negroes that were with the said Gardner, and in consequence thereof the removal of said negroes was abandoned."

On the 12th of September, 1872, the complainant prepared an amended bill to be filed by leave of the Court, but the Court refused to permit it to be filed, because offered after the application to transfer the case to the Federal Court The substance of the amendment being that the said deed of trust, or mortgage, was written by the said John C. Walker, and was signed, acknowledged and executed by the said Richard C. Gardner, in the presence of the said Walker and Vasser, and then and there, upon the day of its date, delivered to the said John C. Walker; and the notes secured by said deed of trust or mortgage were likewise executed at the same time, and were then and there delivered to the said John C. Walker as Trustee of said trust, and the said John C. Walker accepted and received said trust deed and promissory notes as Trustee, and accepted the trust, whereby the legal title passed to said Walker to said land, etc.

On the 13th of September, 1872, a written agreement, signed by the complainant, was entered of record, that the defendant, John C. Walker, need not file an answer, as no decree is sought against him for costs, "or anything else, except the mere divestiture of title to the lands mentioned in the pleadings."

On the 3rd of October, 1872, the Chancellor, upon the application of the defendant, Gardner, ordered the cause to be transferred to the United States Court at Nashville.

The petition, on which this order was made, was sworn to before a Commissioner for Tennessee, in New York, on the 17th of February, 1872.

The petition is filed under the Act of July 27th, 1866, entitled, "an act for the removal of causes in certain cases from State Courts." It is based upon the ground that the petitioner is the only material defendant, because the original bill avers: "That the said Walker has never given bond as Trustee of said trust, and has taken no steps to foreclose the trust, and does not wish, or intend, to execute the same," and "has never accepted said trust as required by the statutes of Tennessee."

The transcript was not filed until the 21st of November, 1872, in the United States Court, at Nashville.

On the 21st of November, 1872, the complainant moved to dismiss the cause, and remand it to the Chancery Court upon the following grounds:

1. That the transcript was not filed in this court within the time required by law, and the undertaking of the defendant, Gardner. (Complainant directs this ground shall not be insisted on.)
2. That this is not a proper case for transfer to this Court, under the Act of Congress, relied on.
3. That the application has not been made properly.
4. That the causes assigned are insufficient.
5. That J. C. Walker, who is a defendant, and a citizen of Tennessee, is a material and essential party, and the Court cannot, therefore, acquire jurisdiction of the parties.
6. Other good causes.

On the 24th of November, 1873, the cause was heard in the United States Circuit Court, at Nashville, and upon the motion of complainant, to dismiss the cause for want of jurisdiction, the Court was of opinion that it had no jurisdiction of the cause, ordering that this cause be stricken from the docket. From this decree the defendant, Gardner, prayed an appeal to this Court, which was granted, upon his giving bond and security, which has been done.

ARGUMENT.

The petition for the removal of this cause from the State Court to this Court, is filed under the Act of the 27th day of July, 1866, ch. 288, and is based exclusively upon the citizenship of the parties. It goes upon the supposition that "the suit is one in which there can be a final determination of the controversy," "so far as it concerns" the petitioner, "without the presence" of his co-defendant, Walker. It will be conceded, I presume, as it has been repeatedly so decided by the Supreme Court of the United States, that "in controversies between citizens of different States, where the jurisdiction of the Courts of the United States depends upon the citizenship of the parties, if there are several co-plaintiff's, each plaintiff must be competent to sue, and, if there are several co-defendants, each defendant must be liable to be sued in these Courts, or the jurisdiction cannot be entertained." And that "Executors and Trustees form no exception to this rule, and if they are not personally qualified by their citizenship, the Courts of the United States will not entertain jurisdiction, although the parties they represent may be qualified."

Coal Co. vs. Blatchford, 11 Wall. 172.
Bank vs. Carrolton Railroad, 11 Wall. 624.
Burney vs. Baltimore, 6 Wall. 280.

It will also be conceded, I presume, as equally well settled, that if the legal presence of the defendant Walker is an absolute necessity, without which the Court cannot proceed to a "final determination of the cause," then the removal has been improperly had, and the cause must be remanded.

Burney v. Baltimore, 6 Wall, 280; 11 Wall, 624.
Case of Sewing Co. 18 Wall. 553, and cases cited.

The object of the original bill is to foreclose a deed of trust made by the defendant Gardner to his co-defendant Walker. If, then, the legal title to the land in controversy passed to Walker, that title cannot be divested out of him, so as to give the purchaser a good title under the foreclosure sale, unless he is before the Court. It is clear, therefore, that there "can be no final determination of the cause," within the meaning of the Act of Congress, without the defendant Walker, if, indeed, the title to the land is in him, or, rather, if the bill avers that it is in him, and that the right of the complainant is made to depend upon the fact. For, I take it, that the petitioner cannot transfer the cause merely because he has, by his answers, put the fact in issue; for then every case could be transferred by simply making an issue; and, its removal cannot be made to depend upon an averment which may, itself, turn out to be untrue.

The bill goes upon the idea that there has been a valid trust created by the deed of Gardner to Walker. If no such trust has ever been created, the bill necessarily fails. The "final determination of the cause" turns upon this point, and, if the issue be found in favor of the complainant, no such determination can be had without the presence of the Trustee. He is an essential and absolutely necessary party to the relief sought.

The learned counsel for the petitioner was fully alive to the difficulty, and has worded the petition so as to produce the impression that the *bill itself* concedes that the title is not in Walker, and it was upon this ground that the Chancellor ordered the removal, and that the complainant sought to amend his bill, so as to preclude the possibility of such a conclusion. In truth, however, when the language of the bill is scrutinized, it will be seen that there is no such concession, and that the petitioner has accomplished his object by the most ingenious subtlety.

That part of the bill relied on by the petitioner is

(Transcript, p. 6,) couched in these words: "Now complainant charges that the said Walker has never given bond as Trustee of said trust, and has taken no steps to foreclose the trust, and does not wish or intend to execute the same." The object of this clause was to show some reason for coming into Court, instead of foreclosing the trust through the Trustee by a sale under the terms of the deed. This was, of course, unnecessary, for the complainant had a right to seek a foreclosure through the Courts, whether the Trustee was willing to act or not. But the unwillingness of the Trustee to act grew out of the requirements of our statute law preliminary to his action. By the Code of Tennessee, Sec. 1974, every Trustee, to whom property exceeding the value of five hundred dollars is conveyed in trust for the benefit of creditors, "before entering upon the discharge of his duty," is required to give bond with two or more good and sufficient sureties, in an amount equal to the value of the property mentioned in the deed or assignment, payable to the State of Tennessee, conditioned for the faithful performance of all the duties imposed upon him by law, and by the terms of the deed or assignment; and take and subscribe, before the Clerk of the County Court of the County in which he resides, an oath to the effect:

1. That he will honestly and faithfully execute all the duties imposed upon him by the law and by the deed.

2. That he will cause to be made a full, true, and perfect inventory of all the trust property which came to his hand.

3. That he will return, or cause to be filed in the office of the Clerk, a full and true account of all the sales of said effects, and of all moneys received or securities taken.

These somewhat onerous requirements, the Trustee in this case was unwilling to comply with before proceeding

to execute the trust, and the complainant was forced to file his bill. But, it need scarcely be said, the complainant had not the least intention of averring, and does not aver that such failure or refusal avoided the trust, or affected the title acquired by the Trustee under the deed. The failure to qualify as required could not, of course, divest a title already vested by the conveyance. It only prevented the Trustee from "entering upon the discharge of his duty," that is, from taking possession of the property and proceeding to sell it. It needed no authority to sustain this plain and obvious construction of the statute, but the Supreme Court of the State has, in effect, twice decided that the failure of the Trustee is merely a ground for his removal, and does not affect the validity of the deed.

Vance v. Smith, 2 Heisk. 343.
Mills v. Harris, 3 Head. 335.

If we turn now again to the allegation of the bill, it will be seen that the averment is, in substance, that the Trustee has not qualified as Trustee, and does not intend to do so. It does not say, nor intend to say, that the Trustee has never acquired title to the trust property, nor accepted the trust. On the contrary, the whole scope, object, and burden of the bill, is exactly the reverse, that a valid trust was created by the deed, and the legal title vested in the Trustee, who, however, will not qualify so as to enable him to discharge his duties. The answer of the defendant, Gardner, ingeniously (transcript, p. 27), affects to admit that his co-defendant "has never accepted the trust;" but the petition for the removal of the cause shows (transcript, p. 36), what was meant by this, by stating: "That the said Walker never took the oath, or filed the inventory required by Trustees before entering upon the discharge of their duties as such, *and has never accepted said trust, as required by the statutes of the State of Tennessee.*"

My position, therefore, is, first, that the bill necessar-

ily goes upon the ground that the defendant, Walker, acquired a valid title to the land sought to be sold, and that there can be no "final determination" of the cause without a decision of this question, and that it cannot be decided unless Walker is before the Court, and that the petitioner cannot lay ground for the removal of the cause by a denial of this fact.

And, secondly, that the petition does not, in fact, deny the averment of the bill in this regard, but only states, what the bill admits, that the Trustee has not *accepted the execution* of the trust by qualifying so as to enable him to discharge the duties of the Trusteeship.

It is obvious, therefore, that the Chancellor has been misled by the ingenuity of the learned counsel for the petitioner, and should not have ordered the transfer of the case.

SUMMARY ARGUMENT.

In controversies between citizens of different States, where the jurisdiction of the courts of the United States depends upon the citizenship of the parties, if there are several co-plaintiffs, each plaintiff must be competent to sue, and, if there are several co-defendants, each defendant must be liable to be sued in those courts, or the jurisdiction cannot be entertained. And Executors and Trustees form no exception to this rule, and, if they are not personally qualified by their citizenthip, the Courts of the United States will not entertain jurisdiction, although the parties they represent may be qualified. Coal Co. vs. Blatchford, 11 Wall. 172.

The petition in this case is filed under the Act of Congress of the 27th of July, 1866, ch. 288, (14 stat. 306), which authorizes the transfer by one defendant, "if the suit is one in which there can be a *final determination* of the controversy, so far as it concerns him,

without the presence of the other defendants as parties in the cause." If the defendant, Walker's, "legal presence," is an "absolute necessity," without which the Court cannot proceed to a "final determination" of the cause, then the removal has been improperly had, and the cause must be remanded. Burney vs. Baltimore, 6 Wall. 280; Bank vs. Carrolton, R., 11 Wall. 624; Case of Sewing Machine Company, 18 Wall, 553.

The sole object of the bill is to foreclose a deed of trust made by the defendant, Gardner, to the defendant, Walker, in trust to secure the debt of the complainant's intestate. There can, of course, be no "final determination" of the cause, upon the supposition that the complainant should be found entitled to relief, unless the property in controversy can be sold under the final decree, so as to give the purchasers a good title. But this cannot be done without having the Trustee before the Court, and so it has been expressly held. McRea vs. Brauch Bank of Alabama, 19 How. 376; Upman vs. Brooks, 2 Sto. 623; Matcalm vs. Smith, 6 McL. 416; Russell vs. Clark, 7 Cr. 68; see also Shields vs. Barrow, 17 How. 139.

To meet this obvious objection, the petitioner for removal seeks to produce the impression that no title to the property passed to the Trustee, and it was upon this erroneous idea that the Chancellor in the State Court acted. And, it was to obviate this erroneous conclusion, that the amendment to the bill was prepared, the Court declining to entertain it, because made after the application to remove. But, the whole scope, object, and general intention of the bill clearly negative the impression sought to be produced. It goes upon the idea that a valid trust was created, which passed the legal title in the property to the Trustee, and asks that this trust be enforced by a sale of the trust property in satisfaction of complainant's debt.

The bill, to show the necessity of active interposition by the Court, charges "that the said Walker has never given bond as Trustee of said trust, and has taken no steps to foreclose the trust, and does not wish, or intend to execute the same." The petition seeks to produce the impression that this amounts to an allegation that the defendant, Walker, has never *accepted* the trust, or, at any rate, that the failure to qualify as Trustee under the State law is equivalent to non-acceptance.

The bill does not allege that the Trustee has never *accepted* the trust, nor used any language from which an inference to that effect can be fairly drawn. It simply avers that the Trustee has never given bond as Trustee, and neither wishes or intends so to do. The bond alluded to, is the bond required by the code of Tennessee, sec. 1974, to be executed by a Trustee, under assignment for the benefit of creditors, *"before entering upon the discharge of his duty."* This bond is required to be in double the value of the property mentioned in the trust deed, and was in this particular case, in view of the large amount of property, peculiarly onerous. The statute also requires an oath of office by the Trustee, and a regular return to the County Court of an inventory of the trust effects, and of the proceeds of sale. The petition of removal admits that this is all that the bill means by stating: "that the said Walker never took the oath, or filed the inventory required of Trustees before entering upon the discharge of their duties as such, *and has never accepted said trust as required by the statutes of the State of Tennessee.*" (Transcript, p. 36.)

The question resolves itself, therefore, into this: Does the statute prevent the vesting of the title in the Trustee until he does comply with its terms, or divest a title once vested upon failure to comply, or does it merely operate to prohibit the Trustee from executing the trust until he has complied, the title, in the meantime, passing to the Trustee, and enuring to the benefit of the *cestui que trust*,

and creating a trust to be executed, if the Trustee fails to comply with the statute, by a Court of Chancery? The very language of the act, in the absence of all authority, answers this query, for it simply requires the Trustee to comply with its terms, not as a prerequisite to the vesting of title, or creation of the trust, but *"before entering upon the discharge of his duty."*

The deed in question expressly provides that the Trustee is not to take possession of the property, or execute the trust, until there has been default, and written notice by the *cestui que trust*. There might not be default for years. Where was the legal title in the meantime? Does the law contemplate the absurdity of requiring, before a trust can be created, that the Trustee shall give bond for the discharge of his duty, when, by the very provisions of the deed, the conditions may be complied with, and no duty ever become incumbent on the Trustee?

But the Supreme Court of the State have, in effect, held that the failure of the Trustee to comply with the act is merely a ground for his removal, and does not affect the validity of the deed. (Vance vs. Smith, 2 Heisk. 343; Miller vs. Harris, 3 Head. 335.

And if there were any doubt upon the point, it must be decided in this case, and it cannot be decided, nor if decided for complainant, can "final determination" of the controversy be had without having the Trustee before the Court.

The foregoing argument was prepared without having seen the brief of the counsel for the appellant. Since then, the brief has been submitted to us, and requires a few words in reply to its positions.

It will be seen that there is an issue of fact between the appellant and appellee, as to what the pleadings of the parties show in reference to Walker's acceptance of the trust. The Court, will, of course, examine the records for itself. We submit, again, that the whole frame and scope of the bill is, that the trust was accept-

ed by Walker but that he declined to qualify under the statute, so as to enable him to execute the trust, because of the amount of the bond required. We submit, also, that the defendant does not, in his answer and petition for removal, expressly own that Walker has never accepted the trust. What he does say, as we have quoted above, is that he has never accepted the trust by *qualifying*, under the statute. The language used embodies a palpable negative pregnant. No such issue as is now insisted upon by the appellant, was intended to be made, or was made.

It may be added that there is nothing in the laws of Tennessee, or the decisions of the Courts, to take this case out of the general rules, recognized in England and America, touching trust deeds. No formal delivery of such a deed is necessary, if the intention to accept sufficiently appears. McEwen vs. Troost, 1 Sneed 186, 191, citing 4 Kent's Com. 456, and Games vs. Stiles, 14 Pet. 326, 327; Martin vs. Ramsey, 5 Hum. 350; 4 Beck. 220; Farrar vs. Bridges, 5 Hum. Dunn. 411, where the deed was held complete, although left in possession of the grantor. And registration by the grantor is equivalent to actual delivery and acceptance. McEwen vs. Troost, 1 Sneed, 191; Farquharson vs. McDonald, 2 Heisk. 418. And it is well settled that the acceptance of the Trustee, and of the *cestuie que trust* will be presumed in the absence of proof to the contrary. Furman vs. Fisher, 4 Cald. 626, 630; Farquharson vs. McDonald, 2 Heisk. 405, 418. And acceptance by the Trustee will be presumed, if he do not positively renounce, when notified, of the trust, even when not actually present, at the execution of the deed. Saunders vs. Harris, 1 Head. 185, 206. The rulings of our Courts are in substantial accord with Armstrong vs. Merrill, 14 Wall. 137, and cases there cited.

It is expressly decided by the court in Vance vs. Smith, 2 Heisk. 354, that a failure of a Trustee to give bond, and otherwise qualify under the provisions of the

Code, does not impair "the *legal operation* and validity of the trust." If the trustee should act without qualification, it would be presumed that the beneficiary had released him, as he is authorized to do by section 1,974 of the Code. The provision is for the benefit of the beneficiary, and he alone can insist upon it. The positive prohibition of our statute law, against an administrator or executor, acting without giving bond, stands upon a different ground altogether. There is no sound analogy between the two classes of cases.

The case of the Batesville Institute vs. Kaufman, 18 Wall. 151, was the assignment of a judgment lien in realty to a Trustee for the benefit of a creditor. The death of this Trustee was properly held, not to affect the right of the beneficiary, or his assignee, to enforce the lien against the realty, the person having the legal title to the latter being before the Court. This case is not in conflict with those cited by us, to the effect that the Trustee, having the legal title, is an essential party to a suit to sell that property.

W. F. & H. Cooper

Solicitors of Appellee